TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 267.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED FOR CERTIORARI TERM OCTOBER 19, 1914.
CERTIORARI AND RETURN FILED JANUARY 4, 1915.

(24,957)

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SUPREME COURT OF THE UNITED STATES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1916.

No. 2466

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Names and Addresses of Attorneys.

For Plaintiff in Error:

PAUL BURKS, Esq., and E. W. CAMP, Esq., 409 Kerckhoff Building, Los Angeles, California.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California;

HARRY R. ARCHBALD, Esq., Assistant U. S. Attorney, Los Angeles, California; and

MONROE C. LIST, Esq., Special Assistant to the U. S. Attorney, c/o Interstate Commerce Commission, Washington, D. C.

[3*]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244 –CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Defendant.

*Page number appearing at foot of page of original certified Record.

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Hon. OLIN WELLBORN, Judge of the United States District Court for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the damage of The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where [4] said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 24th day of July, 1914.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

Allowed this 24th day of July, 1914.

OLIN WELLBORN,
United States Judge. [5]

I hereby certify that a copy of the within Writ was on the 24th day of July, 1914, lodged in the Clerk's Office of the said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 244—Civil. Original. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Writ of Error. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Received copy of the within Writ of Error this 24th day of July, 1914.

ALBERT SCHOONOVER,
Attorney for Plaintiff. [6]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Citation [on Writ of Error (Original)].

United States of America, to the United States of America, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to Writ of Error filed in the clerk's office of the United States District Court for the Southern District of California, Southern Division, sitting at Los Angeles, wherein The Atchison, Topeka and Santa Fe Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned should not

be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Hon. OLIN WELLBORN, Judge of the United States District Court, this 24th day of July, 1914.

OLIN WELLBORN,
U. S. District Judge. [7]

[Endorsed]: No. 244—Civil. Original. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Citation. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [8]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 244—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Defendant. [9]

[Complaint.]

In the District Court of the United States for the Southern District of California, —— Division.

1819.

No. ——.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Now comes the United States of America, by Aloysius I. McCormick, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the Atchison, Topeka & Santa Fe Railway Company, a corporation organized and doing business under the laws of the State of Kansas, and having an office and place of business at Los Angeles, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. **[10]**

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock, P. M., on October 2, 1912, upon its line of railroad at and between the stations of Parker in the State of Arizona and Los Angeles in the State of California within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: C. D. Plank to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 10:40 o'clock, P. M. on said date, to the hour of 8:25 o'clock, P. M. on October 3, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[11]

FOR A SECOND CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock P. M. on October 2, 1912, upon its line of railroad at and between the stations of Parker, in the State of Arizona and Los Angeles in the State of California within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit: C. L. Elmendorf to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 10:40 o'clock P. M. on said date, to the hour of 8:25 o'clock, P. M. on October 3, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [12]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock P. M. on October 2, 1912, upon its line of railroad at and between the stations of Parker in the State of Arizona, and Los Angeles in the State of California within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit W. F. Rossow, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 10:40 o'clock, P. M., on said date, to the hour of 8:25 o'clock P. M. on October 3, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[13]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of fifteen hundred dollars

and its costs herein expended.

A. I. McCORMICK,
United States Attorney.
HARRY R. ARCHBALD,
Asst. U. S. Atty.

[Endorsed]: No. 244—Civil. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, Defendant. Complaint. Filed Mar. 7, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [14]

In the District Court of the United States for the Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Answer.

Now comes The Atchison, Topeka and Santa Fe Railway Company, defendant in the above-entitled cause, and in answer to the complaint of the plaintiff in said action respectfully shows:

I.

That it is and was at the times mentioned in said

complaint a common carrier engaged in interstate commerce substantially as alleged in said complaint; that on or about the times mentioned in said complaint it retained in service the certain employees named in said complaint in excess of 16 hours, substantially as stated in said complaint.

II.

And for further answer and defence to said complaint this defendant shows:

That said station of Parker is a terminal of this defendant and the terminal from which said employees [15] were engaged by this defendant to operate and accompany said train to the City of Los Angeles, in the State of California, which is the terminal to which said employees were destined at the time stated in the complaint; that the schedule and usual time of said train in going from said Parker to said Los Angeles is and was at the times mentioned in said complaint much less than 16 hours, to wit, 11 hours and 5 minutes, and that said train would, at the time mentioned in said complaint, have made said run in about 11 hours and 5 minutes, and in much less than 16 hours, but for certain casualties and unavoidable accidents, and for certain causes which could not have been foreseen by and were not known to said defendant, or any of its officers or agents at the time when said crew left said terminal at Parker; that is to say, said train was delayed at certain stations between Cadiz and Barstow by reason of congestion of trains due to certain washouts caused by storm waters shortly before the passage of said train, which washouts had delayed a number

of passenger trains on the main line of this defendant, congesting all traffic on said line and causing necessary delay to all trains; but that said delays, aggregating 2 hours and 30 minutes before reaching the station of Barstow would not have caused said crew to exceed the time of 16 hours in reaching said station of Los Angeles.

Said train left Barstow at 7:45 A. M. October 3, and shortly thereafter, at 8:30 A. M., an axle broke under the tank of the engine of said train, whereby said train was delayed 6 hours and 10 minutes, although every [16] effort was made to remedy the accident and proceed at the earliest possible moment; that the breaking of the axle was a casualty and unavoidable accident, and was the result of causes which were not known to this defendant, or any of its officers or agents, when said engine left its terminal, to wit, said station of Barstow, and that said casualty could not have been foreseen when said engine left said Barstow.

WHEREFORE, defendant prays that said action may be dismissed, and that it may have judgment for its costs.

Dated March 29, 1913.

E. W. CAMP,
U. T. CLOTFELTER,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

J. L. Hibbard, being by me first duly sworn, says that he is an officer, namely, the Acting General Manager of the defendant named in the foregoing

Answer; that he has read said Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to those matters he believes it to be true.

[Seal] J. L. HIBBARD.

Subscribed and sworn to before me this 29th day of March, A. D. 1913.

J. L. B. HAMILTON,
Notary Public in and for the County of Los Angeles, State of California. **[17]**

[Endorsed]: No. 244—Civil. Dept. ——. In the U. S. District Court, Southern Dist. of California, Southern Division. United States, Plaintiff, vs. A. T. & S. F. Ry. Co., Defendant. Answer. Filed Mar. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received Copy of the within Answer this 31st day of March, 1913. A. I. McCormick, U. S. Atty., by Harry R. Archbald, Asst. U. S. Atty., Attorney for ————. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. **[18]**

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 244—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Judgment.

This cause having come on regularly on Wednesday, the 17th day of June, 1914, being a day in the January Term, A. D. 1914, of the District Court of the United States for the Southern District of California, Southern Division, to be tried before the Court and a jury to be impanelled; Harry R. Archbald, Esq., Assistant U. S. Attorney, and Monroe C. List, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Paul Burks, Esq., appearing as counsel for the defendant; and a stipulation as to facts having been filed in open court, and it appearing that said stipulation contains an express waiver of the right to trial by jury herein; and said cause having thereupon come on to be tried by the Court, sitting without a jury; and said cause having been argued, on behalf of the Government, by Monroe C. List, Esq., Special Assistant to the U. S. Attorney Gen-

eral, of counsel for the United States, and on behalf of defendant by Paul Burks, Esq., of counsel for defendant, and on behalf of the Government in reply by Monroe C. List, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; and said cause having been submitted to the Court for its consideration and decision; and on the 20th day of June, 1914, Findings of Fact and Conclusions **[19]** of Law having been filed by the Court herein, and the Court having ordered that, in accordance with said Findings of Fact and Conclusions of Law, judgment be entered in favor of the plaintiff and against the defendant on each of the three causes of action set forth in the complaint herein, together with costs of plaintiff incurred herein; and that a penalty of $100.00 be assessed on each of said causes of action;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that The United States of America, plaintiff herein, have and recover of and from The Atchison, Topeka & Santa Fe Railway Company, defendant herein, Three Hundred Dollars ($300.00), together with plaintiff's costs herein, taxed at $36.50.

Judgment entered, June 22, 1914.

WM. M. VAN DYKE,
Clerk.
By Leslie S. Colyer,
Deputy Clerk. **[20]**

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Defendant.

Bill of Exceptions.

The above-entitled cause came on regularly for trial, on June 17, 1914, before the Honorable OLIN WELLBORN, Judge of the above-entitled court, sitting without a jury, a jury trial having been expressly waived by the parties hereto; Messrs. Albert Schoonover, Harry R. Archbald and Monroe C. List appeared as counsel for plaintiff, and Paul Burks, Esq., appeared as counsel for defendant; and the following proceedings were then had:

The following stipulation as to facts was then read in evidence:

"In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant.

Stipulation as to Facts.

The parties hereto, by their respective attorneys, for the purpose of facilitating the trial of the above-entitled cause, hereby agree that upon such trial the following facts are stipulated and admitted to be true and that no proof thereof need to be introduced, but that the same shall [21] be accepted upon such trial as agreed facts the same as though written documentary evidence or oral testimony with respect thereto had been duly and regularly introduced upon such trial by witnesses duly sworn and examined; and the calling and swearing of witnesses and the introduction of documentary evidence to prove the facts hereinafter stated is hereby expressly waived.

I.

That The Atchison, Topeka and Santa Fe Railway Company, defendant, is a corporation duly organized and existing under the laws of the State of Kansas, and is and was at the times mentioned in

plaintiff's complaint a common carrier engaged in interstate commerce by rail in the State of California, and having an office and place of business at Los Angeles, California.

II.

That at the times mentioned in the complaint herein the defendant was the owner of and was operating what is known as the Santa Fe Railway System, one of the main lines of which extended from Chicago, in the State of Illinois, to Los Angeles and San Francisco, in the State of California, and in connection with which said defendant operated numerous branches extending from a connection with said main line to various points, one of which said branch lines, known as the Arizona and California branch, extended from Cadiz, California (a point 100 miles east of Barstow), to Parker, Arizona, and thence to Phoenix, Arizona.

III.

That certain of the lines of said Railway System west of Albuquerque, New Mexico, were operated as a Grand Operating Division of said system, constituting what is known as The Atchison, Topeka and Santa Fe Railway Company—Coast [22] Lines, whereas the lines of said system situated south of Ash Fork, Arizona, and east of Parker, Arizona, were operated as a separate and distinct Grand Operating Division, and were known as The Atchison, Topeka and Santa Fe Railway Company—S. F. P. & P. Lines.

IV.

That at the times mentioned in said complaint, and

for some time previous thereto, there was being operated between Los Angeles, California, on said Coast Lines, and Phoenix, Arizona, on said S. F. P. & P. Lines, a certain interstate passenger train known and designated as "Phoenix Express"—the train running from Los Angeles to Phoenix being known as train No. 18 and the train operated from Phoenix to Los Angeles being known as train No. 17, both of which said trains customarily and at the time in question were engaged in transporting United States mail, in a railway mail car which constitutes a part of the regular equipment of said train, interstate express, and interstate passengers and their baggage.

V.

That said train No. 17 customarily and upon the dates in question, and at the times mentioned in plaintiff's complaint, moved from Phoenix, Arizona, to Parker, Arizona, in charge of a certain train and engine crew in the employ of said S. F. P. & P. Lines, and that customarily, and at the times mentioned in said complaint, the train and engine crews in charge of said train were changed at Parker, Arizona, at which point there was attached to said train an engine in charge of an engine crew which customarily, and at the times mentioned in said complaint, ran from Parker, Arizona, to Barstow, California, a distance of 183.5 miles. That customarily, and at the times mentioned in said complaint, the [23] said train No. 17 was at Parker taken in charge of and handled from Parker, Arizona, to Los Angeles, California, a distance of 335.3 miles, by what is known as a "passenger train crew," consisting of

one conductor and two brakemen.

VI.

That at the times mentioned in said complaint, said passenger train crew consisted of conductor C. D. Plank and brakemen C. L. Elmendorf and W. F. Rossow, all three of whom were employees of the Santa Fe Coast Lines of said defendant, mentioned in said complaint.

VII.

That on October 2d and 3d, 1912, said passenger train No. 17, being the train mentioned in the several causes of action in plaintiff's complaint set forth, was operated between Parker, Arizona, and Los Angeles, California, by the employees in said complaint and hereinbefore described, and that said employees were required and permitted to be and remain on duty in connection with the movement of said train from 10:40 o'clock P. M., on October 2d, until 8:25 o'clock P. M., on October 3d, 1912, under the circumstances hereinafter set forth.

VIII.

That the employees mentioned in said complaint were under the rules of the defendant required to, on October 2, 1912, and did, report for duty at Parker, Arizona, at 10:40 o'clock P. M., and at 11:10 o'clock P. M. on October 2, 1912, departed from Parker, Arizona, in charge of said train, which was moved from Parker to Los Angeles as shown by the table hereunto attached, marked Exhibit "A," hereby referred to and made a part hereof, which said Exhibit "A" shows the schedule running time of said train No. 17, the actual running time [24]

on the days in question, the distances between the principal stations through which said train passed, the distance of each of said stations from Parker, and the hours said employees had been on duty at the time of their departure from each of said stations, at all of which there were sidetracks of capacity sufficient to accommodate said train No. 17, and all of which stations were continuously operated as night and day telegraph offices, and were continuously in touch with the office of the chief train dispatcher who was in charge of and was directing the movement of said train No. 17.

IX.

That in connection with the operation on said Coast Lines of the defendant all trains moving thereover between Barstow, California, and Seligman, Arizona, a distance of 318 miles, and between Cadiz, California, and Parker, Arizona, are moved pursuant to the directions of a chief dispatcher upon what is known as the "Arizona Division" with offices at Needles, California, and that all west-bound trains upon reaching Barstow, California, come under the supervision of and are operated by the chief dispatcher of what is known as the "Los Angeles Division" with offices at San Bernardino, California. That the orders and directions of the chief dispatcher of said Los Angeles Division are communicated to trains by certain train dispatchers operating under the direction of said chief dispatcher by whom orders with respect to the movement of trains between Barstow and Los Angeles are communicated by means of telephone or telegraph through the opera-

tors at the various stations to the various trains moving under the direction of said chief dispatcher. [25]

X.

That the terminals for the passenger train crews engaged in the movement and operation of said trains Nos. 17 and *17* are Los Angeles, California, and Parker, Arizona; that the employees described in said complaint, resided and had their homes in Los Angeles, California, from which point they customarily, and immediately previous to the times mentioned in said complaint, left for Parker, Arizona, in charge of train No. 18, which arrived in Parker at or about 1:15 A. M. on October 2, whereupon said passenger train crew was released from duty until 10:40 o'clock P. M. on October 2, during which time they were not performing any service nor held responsible for the performance of any service should the occasion therefor arise, but during which time they were permitted to enjoy the accommodations for rest and *good with* which they had provided themselves at Parker, which was their "away-from-home-terminal." That customarily, and at or about the times mentioned in said complaint, the passenger train crew in charge of said train No. 17 would reach Los Angeles at or about 10:15 A. M., from which time until 10:30 o'clock P. M. on the following day they were not performing any service nor held responsible for the performance of any service should the occasion therefor arise, but during which times they were permitted to repair to and remain at their respective homes at Los Angeles,

which was their "home" terminal.

XI.

That said train No. 17 mentioned in said complaint, which left Parker, Arizona, at 11:10 P. M. on October 2, 1912, arrived at Barstow, California, at 7:10 o'clock A. M. on October 3d, they having been delayed between Cadiz and Barstow for a period of 2 hours and 30 minutes on account of washouts, [26] the causes of which said delays to said train between Cadiz and Barstow were not known to the defendant, or to any of its officers or agents in charge of said employees, at the time said employees left Parker, and which could not have been foreseen.

XII.

That said train No. 17 mentioned in said complaint was scheduled to leave Barstow at 4:45 o'clock A. M. on October 3, but that by reason of the delay to said train in reaching Barstow it actually left Barstow at 7:45 o'clock A. M. with ample time then remaining to reach Los Angeles within less than 16 hours from the time when said conductor and brakemen entered upon their service, but that at 8:30 o'clock and while said train was being operated between Barstow and San Bernardino, namely, between Bryman and Oro Grande, California, an axle broke under the tank of the engine by which said train was being moved between Barstow and San Bernardino, California, whereby the movement of said train was necessarily and unavoidably delayed for a period of 6 hours 10 minutes, with the result that said train instead of reaching San Bernardino at 7:35 A. M., according to its usual schedule, or at 10:35 A. M., as

it would have done but for the delays in reaching and leaving Barstow, actually arrived at San Bernardino at 5:30 P. M., and that instead of reaching Los Angeles at 10:15 A. M., in accordance with its usual schedule, or at 1:16 P. M., as it would have done but for the delays in reaching and leaving Barstow had there been no further delay, actually reached Los Angeles at 8:25 P. M. on October 3d, said employees having then been on duty for 21 hours 45 minutes, but that the breaking of the axle whereby said train was delayed for a period of 6 hours 10 minutes between Bryman and Oro Grande was a casualty and an unavoidable accident and [27] that the delay to said train caused thereby was the result of causes which were not known to defendant, or to any of its officers or agents in charge of said employees at the time said employees left said terminal of Parker, and which could not have been foreseen.

XIII.

That the said train No. 17 after having been delayed in reaching and leaving Barstow, as hereinbefore described, and after having been delayed for a period of 6 hours 10 minutes by said broken axle, as hereinbefore described, proceeded to the city of Los Angeles in charge of the employees in whose charge said train had left Parker, and that in going to Los Angeles said train and said employees passed through the station of San Bernardino, California, which is a point known and designated as a division terminal and which was a place appointed and

customarily used as a terminal from and to which crews of certain other passenger and freight trains of the defendant brought their trains, but which was not a terminal for the passenger train crews in charge of said trains Nos. 17 and 18 or of any other of defendant's trains operating between said station of Parker and said station of Los Angeles, and at and previous to the time the said employees in charge of said train No. 17 had been continuously on duty for a period of 16 hours, defendant had in its employ at Los Angeles and also San Bernardino passenger train crews which were customarily assigned to other passenger trains and crews which were subject to call which were customarily used in operating freight trains who were qualified should necessity require to operate passenger trains between San Bernardino and Los Angeles. That the employees in charge of said train No. 17 could have been relieved at San Bernardino and said train placed in charge of one of [28] such other freight or passenger train crews at a time which would have permitted the employees in charge of said train No. 17 to deadhead from San Bernardino to Los Angeles, California, on said train No. 17, without performing any service and without being held responsible for the performance of any service in connection with the movement of said train No. 17 should the occasion therefor arise. That the effect of the breaking of the axle upon the tank of the engine which was hauling said train No. 17 was to block the defendant's main line between said stations of Bryman and Oro Grande, which rendered it necessary to send from San Ber-

nardino to the point where said axle broke and where said line was blocked a "wrecking crew," which said crew in addition to the other equipment which it required to open said main line for traffic had with it what is known as a portable telephone, by means of which communication was established between San Bernardino and the point where said line was blocked.

XIV.

That before the delay of 6 hours 10 minutes which resulted from said broken axle had expired, and before the damage which had caused such delay had been repaired, and before the said train left the point where such damage occurred, it was known to the defendant and to its officers and agents in charge of said employees mentioned in said complaint that such employees would have been on duty in excess of 16 hours by the time said employees reached San Bernardino, but that no effort was made to relieve said employees before they had been continuously on duty in excess of 16 hours, either previous to or at the time of their arrival at San Bernardino, or at any time before said employees reached Los Angeles. [29]

XV.

That it is commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains that the word "terminal" has reference to certain train or trains or certain crew or crews, and means the beginning or the end of the employee's run or the point at which in the regular course of business he

w ıld go on duty as a member of a particular crew, or at which in the regular course of business he would cease to be a member of such crew of a particular train and be relieved from duty. In other words, the point at which he becomes a member of a train crew in charge of a particular train and the point to which it was intended at the time when he became a member of such crew of such train that he should accompany such train as a member of such crew; and that it is not generally understood among railroad men that the word "terminal" as applied to any particular train or the crew thereof refers to relay or division point between the point at which an employee became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the run, or the terminal for other crews and other trains.

XVI.

That the failure of this defendant to make any effort to relieve the said employees before they had been continuously on duty for a period in excess of 16 hours or at any time before said employees reached Los Angeles was due to the understanding and belief of the officers and agents in charge of such employees that the delay to said train by reason of said casualties and unavoidable accidents justified [30] the retention in service of said employees until they should have taken said train through to the home terminal of said employees at Los Angeles,

California, and to the belief that the retention in service of said employees in excess of 16 hours was the result of a casualty and unavoidable accident, and that the delay to said train and any excess service on the part of such employees which may have resulted from said delay to said train was the result of causes not known to defendant, or to any of its officers or agents in charge of such employees at the time said employees left their away-from-home terminal at Parker, and which would not have been foreseen.

XVII.

That the railway of defendant is customarily and at the times mentioned in the complaint was a well-managed railway, operated in accordance with the best known custom and usage prevailing among well-operated railways throughout the United States, and that said defendant considered it desirable and in accordance with custom and usage prevailing upon defendant's and other well-operated railroads, from the point of view both of said railway and of its employees in question, that they should be permitted at the earliest opportunity to reach their home terminal at Los Angeles where they might rest at their respective homes before being again required to go on duty.

XVIII.

That under date of March 16, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the hours of service act (34 St. L. 1415) in words and figures as follows:

(i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against those which involved no neglect or lack *or* precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Rule 88) "Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vo. 1, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

That under date of May 5, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the hours of service act (34 St. L. 1415) in words and figures as follows:

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See Rule 287-b.)

That under date of May 25, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the hours of service act (34 St. L. 1415), in words and figures as follows:

> (b) Section 3 of the law provides that: "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where *the delay* was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."
>
> Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See Rule 287.)

XIX.

That in its annual report to Congress dated December 24, 1908, the Interstate Commerce Commission, in referring to the hours of service law, said:

[32]

THE HOURS OF SERVICE LAW.

> "The federal hours of service act was approved March 4, 1907, to become effective one year from the date of its enactment. . . . .
>
> The law became effective on the 4th of March, 1908. . . . .
>
> Questions immediately arose as to its proper interpretation. With a view to explaining, in so far as possible, those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings:

Section 1.

The law is applicable to every common carrier subject to the act to regulate commerce and to every employee concerned in the physical operation of such company's trains.

Section 2.

The requirement for ten consecutive hours off duty applies only to such employees as have been on duty for sixteen consecutive hours.

The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen hours, but have been on duty sixteen hours in the aggregate of a twenty-four hour period.

A telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period.

A twenty-four hour period begins when the employee goes on duty after an interim of not less than eight consecutive hours off duty.

Time 'on duty' includes the entire period of service or responsibility therefor.

A 'week' means a calendar week, beginning with Sunday.

Section 3.

The exemptions prescribed by this section contemplate only such accidents as could not by the exercise of diligence on the part of the carriers, their agents, or officers, have been anticipated and prevented.

Employees performing excess service are not liable to the penalties provided by the act.

Employees unavoidable delayed by reason of causes that could not, at the commencement of a trip have been foreseen, may lawfully continue on duty to the terminal or end of that run.

. . . . It is understood and so maintained by the Commission, that Congress in using this expression intended to confer for the enforcement of the hours of service law each and every power heretofore granted to the Commission; that inasmuch as the act to regulate commerce empowers the Commission, in the administration of that law, to require reports under oath, a similar authority may lawfully be exercised by the Commission in the execution of the hours of service law.

Another criticism in regard to the act under consideration has reference to section 3 thereof, that—

The provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God. [33]

Presuming upon these exceptions, carriers have endeavored to explain their failures to comply with the law by a variety of reasons which, in the opinion of the Commission are not emergencies such as were contemplated by Congress in the drafting of the statute. Among these excuses may be mentioned 'leaky valves,' 'hot boxes,' 'drawheads pulled out'; 'engine failures'

from various causes not explained, 'broken air hose,' etc., some of which have resulted in detaining men on duty for continuous periods of more than forty-one hours.

It is respectfully suggested that the law in this particular should, so far as possible, be made specific, so as to restrict the exercise on the part of carriers of discretion in determining whether or not a given incident is a 'casualty' or 'unavoidable accident' within the meaning of the act; or that some one should be designated and empowered to decide all such questions.

While the commission is practically convinced that the act in its present form confers upon it all the power necessary to effect the objects for which it was adopted, still its terms are susceptible of more than *on* interpretation. Hence controversies must necessarily arise and while such questions can, of course, after the usual period of litigation be judicially determined, their settlement by such means will entail a large expense upon the Government, as well as considerable delay in attaining the full measure of benefit which the law should reasonably afford. It is therefore desirable that Congress should, by a few lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise."

XX.

That the above-entitled cause may be and it is hereby submitted to the Court for decision, a jury trial of the above-entitled cause being hereby ex-

pressly waived by both parties, upon the foregoing agreed statement of facts, subject to the right of either party to have any decision rendered by the above court upon such agreed statement of facts reviewed by the Circuit Court of Appeals or by the Supreme Court of the United States as fully and to the same extent as though said cause had been tried to a jury.

Dated at Los Angeles, California, June 17th, 1914.

ALBERT SCHOONOVER,
United States Attorney,
HARRY R. ARCHBALD,
Asst. United States Attorney,
MONROE C. LIST,
Special Assistant to U. S. Attorney,
Attorneys for Plaintiff. [34]
E. W. CAMP,
U. T. CLOTFELTER,
PAUL BURKS,
Attorneys for Defendant. [35]

Exhibit "A."

Showing schedule running time and actual running time of train No. 17 on October 2d, 3d, 1912; distance between principal stations through which said train passed between Parker and Los Angeles; distance of each of said stations from Parker and time employees in charge of said train had been on duty at the time of their departure from said stations.

Stations.	Distance from Parker	Schedule Time.	Actual Running Time.	Time on Duty.
Lv. Parker		11:10 pm.	11:10 pm.	30"
84.6				
Ar. Cadiz	84.6	1:35 am.	1:35 am.	2' 55"
Lv. Cadiz	84.6	1:40 am.	1:40 am.	3' 00"
98.9				
Ar. Barstow	183.5	4:40 am.	7:10 am.	8' 30"
Lv. Barstow		4:45 am.	7:45 am.	9' 05"
11.8				
Cottonwood	195.3	5:05 am.	8:06 am.	9' 26"
14.2				
Bryman	209.5	5:28 am.	8:17 am.	9' 37"
5.4				
Oro Grande	214.9	5:28 am.	3:23 pm.	16' 43"
5.3				
Victorville	220.2	5:50 am.	3:36 pm.	16' 56"
8.4				
Hesperia	228.6	6:10 am.	3:56 pm.	17' 16"
10.8				
Summit	239.4	6:43 am.	4:21 pm.	17' 41"
15.0				
Devore	254.4	7:15 am.	5:10 pm.	18' 30"
10.2				
Ar. San Bernardino	264.6	7:35 am.	5:30 pm.	18' 50"
Lv. " "		8:00 am.	5:56 pm.	19' 16"
9.9				
Riverside	274.5	8:20 am.	6:30 pm.	19' 50"
60.8				
Ar. Los Angeles	335.3	10:15 am.	8:25 pm.	21' 45"

Note:—The figures shown between stations indicate the miles between such stations. [36]

There was no further or additional testimony introduced at the trial.

The cause was then argued and submitted to the Court, and judgment ordered for plaintiff, to which order defendant duly excepted.

Thereafter the Court made and filed Findings of Fact and Conclusions of Law in words and figures as follows:

"*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 17th day of June, 1914, was tried before the Court without a jury, a trial by jury having been expressly waived by a stipulation in writing, signed by the attorneys for both parties hereto and filed with the Clerk of this court, said parties having agreed and stipulated as to the facts upon which said trial are admitted to be true, and as to which no proof thereof need to be introduced, and the Court finds as facts all the matters set out in paragraphs I, II, III, *IC,* V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX of said stipulation as

to facts, filed herein, which said paragraphs are expressly referred to and made a part of these findings of fact.

As conclusions of law, from the foregoing findings [37] the Court finds that the act of the defendant railroad company in requiring and permitting said C. D. Plank, conduct[illegible]l C. L. Elmendorf and W. F. Rossow, brakeme[illegible]ontinue on said run to the City of Los Angeles, in the State of California, was a violation of the provisions of the Hours of Service Act, approved March 4, 1907, and that plaintiff is entitled to a judgment against said defendant by reason thereof, on each cause of action set forth in said complaint, together with costs of plaintiff incurred herein; that a penalty of $100.00 be, and it is, hereby assessed on each of said causes of action.

It is ordered that judgment be entered in accordance herewith.

Done in open court this 20th day of June, 1914.

OLIN WELLBORN,
District Judge."

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled action that the foregoing Bill of Exceptions contains all the evidence offered and received at the trial of the said cause, and all proceedings at the trial thereof, and full, true and correct copies of the agreed statement of facts upon which said cause was submitted for decision, and the findings of fact and conclusions of law, together with the substance of the

orders made by the Court; and the said Bill of Exceptions may be settled, allowed and filed.

MONROE C. LIST,
HARRY R. ARCHBALD,
ALBERT SCHOONOVER,
Attorneys for Plaintiff.
E. W. CAMP,
U. T. CLOTFELTER,
PAUL BURKS,
Attorneys for Defendant. [38]

Pursuant to the foregoing stipulation, this Bill of Exceptions is hereby approved, allowed, and the same is ordered filed.

Dated July 17th, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: No. 244—Civil. Original. Dept.——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Bill of Exceptions. Filed Jul. 17, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for ————. [39]

"In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Assignment of Errors.

Comes now The Atchison, Topeka and Santa Fe Railway Company, defendant in the above-entitled cause, and files the following Assignment of Errors upon which it will rely in its prosecution of a Writ of Error in the above-entitled cause, petition for which said writ of error to review the judgment of this Honorable Court made and entered in said cause on the 22d day of June, 1914, it files at the same time with this Assignment.

ASSIGNMENT I.

That the United States District Court for the Southern District of California, Southern Division, erred in denying defendant's motion for a judgment in its favor and against the plaintiff, made by it at the time when this cause was submitted to said Court for its decision upon the pleadings and upon the agreed statement of facts filed in the above cause, for the reason that it affirmatively appears from said agreed statement of facts that the retention in service during the period mentioned in plaintiff's com-

plaint of the employees therein mentioned was not in violation of the Act of Congress entitled "An Act [40] to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, (34 St. L. 1415) because,—

(a) The delay to which were subjected the train and the employees in charge of the train mentioned in said complaint was the result of a cause not known to defendant or any officer or agent in charge of such employees at the time when said employees left a terminal and which could not have been foreseen; and

(b) That the retention in service during the time mentioned in said complaint of each of the employees therein named was the result of a casualty and of an unavoidable accident, by reason whereof the said Act of Congress did not apply to the retention in service of such employees in excess of sixteen hours, under the circumstances as set forth in said agreed statement of facts; and

(c) That the retention in service of said employees under the circumstances shown by said agreed statement of facts in excess of sixteen hours was expressly authorized by said Act of Congress and that said Act of Congress did not prohibit—but, on the contrary, expressly authorized—such service, under the circumstances as shown by said agreed statement of facts.

ASSIGNMENT II.

That said Court erred in finding that the act of the defendant in requiring and permitting conductor

C. D. Plank and brakemen C. L. Elmendorf and W. F. Rossow to continue on their run to the city of Los Angeles, in the State of California, was a violation of the provisions of the hours of service act (approved March 4, 1907; 34 St. L. 1415), for the **[41]** reason (1) that the train of which said conductor and brakemen were in charge had, after starting on its run, been delayed by reason of a casualty and an unavoidable accident, and (2) that the delay to which said train and said employees were subjected was the result of a cause not known to defendant, or to any of its officers or agents in charge of such employees, at the time such employees left a terminal and which could not have been foreseen.

ASSIGNMENT III.

That the Court erred in finding that plaintiff was entitled to a judgment against the defendant on each cause of action set forth in plaintiff's complaint, together with costs of plaintiff incurred in said action, and in assessing a penalty of $100.00 against the defendant on each of said causes of action, for the reason that, as fully appears from the agreed statement of facts upon which said cause was submitted to the Court for its decision, the service of said employees, as alleged in said complaint, was not in violation of the Act of Congress entitled, "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 St. L. 1415), and that said Act did not prohibit—but, on the contrary, expressly authorized—said service, un-

der the circumstances shown by such agreed statement of facts.

ASSIGNMENT IV.

That the judgment made, rendered and entered in the above cause is contrary to the evidence contained in the agreed statement of facts upon which said cause was submitted to the Court for decision in this, that it affirmatively **[42]** appears from said agreed statement of facts that the retention in service of the employees therein and in plaintiff's complaint mentioned, during the time therein and in said complaint mentioned, was not in violation of the Act of Congress known as the hours of service act, and such Act of Congress did not apply to or prohibit—but, on the contrary, expressly authorized—such service of such employees, under circumstances as shown and set forth in said agreed statement of facts.

ASSIGNMENT V.

That the judgment made, rendered and entered in the above cause is contrary to law, because:

(a) The delay to which the train mentioned in plaintiff's complaint and the employees mentioned in said complaint who were in charge of said train were subjected was the result of a cause not known to defendant or any officer or agent in charge of such employees at the time when said employees left a terminal and which could not have been foreseen; and

(b) That the retention in service during the time mentioned in said complaint of each of the employees therein mentioned was the result of a casualty and of an unavoidable accident, by reason whereof the

said Act of Congress did not apply to the retention in service of said employees in excess of sixteen hours, under the circumstances as shown by said agreed statement of facts; and

(c) That under and by virtue of the terms of the proviso in sec. 3 of the said Act of Congress entitled "An Act to promote the safety of employees and travelers upon [43] railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 St. L. 1415), set forth and contained, the retention in service during the time in said complaint mentioned of the employees therein named and for such period in excess of sixteen hours as would enable said employees to complete their run to Los Angeles, under the circumstances which are shown by said agreed statement of facts to have caused such service, was expressly authorized, and the said Act of Congress did not apply to and did not prohibit the said service of said employees.

And upon the foregoing Assignment of Errors and upon the record in said cause, the defendant prays that said judgment may be reversed.

E. W. CAMP,
PAUL BURKS,
Attorneys for Defendant.

[Endorsed]: No. 244—Civil. Original. Dept. ——. District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Assignment of Errors. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the

within assignment of errors this 24th day of July, 1914. Albert Schoonover, Attorney for Plaintiff. E. W. Camp, Paul Burks, Attorneys for Defendant. [44]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Defendant.

Petition for Writ of Error and Supersedeas.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the judgment of the Court entered on June 22d, 1914, comes now by Paul Burks, its attorney, and files herewith an Assignment of Errors, and petitions said Court for an order allowing said defendant to procure a Writ of Error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until

the termination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated July 18, 1914.

E. W. CAMP,
PAUL BURKS,
Attorneys for Defendant. **[45]**

[Endorsed]: No. 244—Civil. Original. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Petition for Writ of Error and Supersedeas. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within petition this 24th day of July, 1914. Albert Schoonover, Attorney for plaintiff. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. **[46]**

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,
Defendant.

Order Allowing Writ of Error.

Upon motion of E. W. Camp and Paul Burks, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors,—

IT IS ORDERED that a writ of error be and the same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein.

Dated July 24th, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 244—Civil. Dept.——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The At. & S. F. Ry. Co., Defendant. Order Allowing Writ of Error. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [47]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Order Staying Proceedings.

The defendant, The Atchison, Topeka and Santa Fe Railway Company, having on the 17th day of July, 1914, filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed, now, therefore,

IT IS ORDERED that upon said defendant filing with the clerk of this court a good and sufficient bond in the sum of Five Hundred Dollars ($500.00), to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and [48] virtue, the said bond to be approved by this Court, that all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

Dated July 24th, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 244—Civil. Dept.——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. the At. & S. F. Ry. Co., Defendant. Order Staying Proceedings. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. **[49]**

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, The Atchison, Topeka and Santa Fe Railway Company, a corporation, as principal, and National Surety Company, as surety, are held and firmly bound unto United States of America, the plaintiff above named, in the sum of Five Hundred Dollars ($500.00), to be paid to said United States of America, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and

our and each of our successors and assigns, firmly by these presents.

Sealed with our seals, and dated, this 18th day of July, A. D. 1914.

WHEREAS, the above-named defendant, The Atchison, Topeka and Santa Fe Railway Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States of America, Southern District of California, Southern Division, rendered and entered in said cause on the 22d day of June, 1914.

NOW, THEREFORE, the condition of this obligation is such that if the above-named, The Atchison, Topeka and [50] Santa Fe Railway Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

[Seal] By A. G. WELLS,
Its General Manager.

Attest: G. HOLTERHOFF, Jr.,
Western Asst. Secretary.

NATIONAL SURETY COMPANY,

[Seal] By CHAS. SEYLER, Sr.,
Its Resident Vice-president.

H. EVERETT CHARLTON,
Resident Assistant Secretary. [51]

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

State of California,
County of Los Angeles,—ss.

On this 21st day of July, one thousand nine hundred and fourteen, before me personally came Chas. Seyler, Sr., known to me to be the Resident Vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Atchison, Topeka & Santa Fe Railway Co. as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the city of Los Angeles, State of California; that he is the Resident Vice-president of said Company and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Atchison, Topeka & Santa Fe Railway Co. is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-president of said Company, and that he is acquainted with H. Everett Charlton and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said H. Everett Charlton subscribed to said Bond is in the genuine handwriting of said H. Everett Charlton, and was thereto sub-

scribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of one thousand ($1000) dollars.

That Frank L. Gilbert is our agent to acknowledge service in the Judicial District wherein this bond is given.

CHAS. SEYLER, Sr.
(Deponent's Signature.) [52]

Sworn to, acknowledged before me, and subscribed in my presence this 21st day of July, 1914.

[Seal] HAZEL JONES,
(Officer's signature, description and seal.)
Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond is approved as to form, amount, and sufficiency of surety.

ALBERT SCHOONOVER,
U. S. Atty.

[Endorsed]: Original. No. 244—Civil. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The At. & S. F. Ry. Co., Defendant. Bond. The foregoing Bond is hereby approved. Olin Wellborn, Judge. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [53]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above Court:

Sir: Please issue a certified copy of the record in the above-entitled cause, consisting of the papers following:

1. Complaint.
2. Answer.
3. Judgment.
4. Bill of Exceptions (in which there is included the Stipulation as to Facts upon which said cause was submitted, and the Findings of Fact and Conclusions of Law).
5. Petition for Writ of Error.
6. Assignment of Errors.
7. Writ of Error.
8. Order Allowing Writ of Error.
9. Citation in Error.

Said record to be certified under the hand of the Clerk and the seal of the above Court.

PAUL BURKS,
Attorney for Defendant. [54]

Receipt of a copy of the foregoing praecipe (in which there is set forth all papers necessary to a determination by the Circuit Court of Appeals of the Writ of Error prosecuted by the defendant) is hereby admitted this —— day of July, 1914.

MONROE C. LIST,
HARRY R. ARCHBALD,
ALBERT SCHOONOVER,
Attorneys for Plaintiff.

[Endorsed]: No. 244—Civil. Original. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The At. and S. F. Railway Company, Defendant. Praecipe. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. **[55]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 244—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A Corporation,
Defendant.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-five (55) typewritten pages, numbered from 1 to 55, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Complaint, Answer, Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Order Staying Proceedings, Bond on Writ of Error and Praecipe for Transcript in the above and therein-entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by its attorney of record.

I do further certify that the cost of the foregoing record is $25.85, the amount whereof has been paid me by The Atchison, Topeka & Santa Fe Railway Company, the plaintiff [56] in error in said cause

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 17th day of August, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America in and for the Southern District of California. [57]

[Endorsed]: No. 2466. United States Circuit Court of Appeals for the Ninth Circuit. The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed August 21, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2466

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2466.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order of Submission.

ORDERED, above-entitled causes argued by Mr. James E. Kelby, counsel for the plaintiff in error, San Pedro, Los Angeles & Salt Lake Railroad Com-

pany, a corporation, by Messrs. E. W. Camp and Paul Burks, counsel for the Atchison, Topeka & Santa Fe Railway Company, a corporation, and by Mr. Philip J. Doherty, Special Assistant United States Attorney, and counsel for the defendants in error, The United States of America, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein: * * * No. 2466. * * * The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Plaintiff in

Error, vs. The United States of America, Defendant in Error.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Writ of Error to the United States District Court for the Southern District of California, Southern Division.

Action at law by the United States against the Plaintiff in Error to recover penalties for alleged violation of the Act of Congress, entitled, "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 Stat. 1415).

U. T. CLOTFELTER, E. W. CAMP and PAUL BURKS, for the Plaintiff in Error.

ALBERT SCHOONOVER, United States Attorney, HARRY R. ARCHBALD, Assistant United States Attorney, MONROE C. LIST, Special Assistant to the United States Attorney, for the United States.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, delivered the opinion of the Court:

The plaintiff in error is charged in the complaint filed by the United States with having permitted three of its employees to be and remain on duty for a longer period than sixteen hours, to wit, from the hour of 10:40 P. M. on October 2d, 1912, to the hour of 8:25 P. M. on October 3d, 1912. It appears from the stipulated facts filed in the court below that the employees of the plaintiff in error were employed as conductor and brakemen, respectively, on one of the trains of the plaintiff in error running between Parker, Arizona, and Los Angeles, California; that the employees went on duty at Parker, Arizona, at 10:40 P. M. on October 2d, 1912; that the train on which they were employed left Parker at 11:10 P. M. of that date and arrived at Barstow, California, at 7:10 A. M. on October 3d, 1912, having been delayed between the two points for a period of two hours and thirty minutes on account of washouts; that the train left Barstow, California, at 7:45 A. M. on October 3d, with ample time then remaining to reach Los Angeles within less than sixteen hours from the time the employees entered upon their duties, but while the train was being operated between Barstow and San Bernardino an axle broke under the tank of an engine whereby the movement of the train was unavoidably delayed for a period of six hours and ten minutes, with the result that the train reached San Bernardino at 5:30 P. M. and Los Angeles at

8:25 P. M. on October 3d, the employees having then been on duty for twenty-one hours and forty-five minutes; that before the delay of six hours and ten minutes caused by the broken axle had expired, and before the damage which had caused the delay had been repaired, and before the train left the point where such delay occurred, it was known to the plaintiff in error that its employees would have been on duty in excess of sixteen hours by the time the train reached San Bernardino; but no effort was made to relieve the employees before they had been on duty in excess of sixteen hours, either previous to or at the time of their arrival at San Bernardino, or at any time before the employees reached Los Angeles; that San Bernardino was a division terminal but was not a terminal for the employees of the train involved in this proceeding, but the employees of the plaintiff in error could have been relieved at that place and the train placed in charge of another crew.

The position taken by the plaintiff in error is, that the facts above set forth constitute no violation of the statute, for the reason that the terminal of its train was Los Angeles and it was entitled to permit its employees to be and remain on duty until that terminal was reached, regardless of whether the sixteen hour period prescribed by the statute had expired. The Government's contention is, that where delays have occurred, the employees may continue to operate the train, but that they cannot be held in service beyond the sixteen-hour period prescribed by the act if a suitable stopping-place should be reached at which they may be relieved; and that if such a place

is reached and the employees are not relieved, there is a violation of the law.

The positions taken by each of the parties in the present action, and the arguments advanced in support of those positions, are in all substantial respects identical with the positions and arguments of the parties in the case of The San Pedro, Los Angeles and Salt Lake Railroad Company, vs. The United States of America, —— Fed. ——, decided by this Court on February 1st, 1915. On the authority of that case the judgment of the court below is affirmed.

[Endorsed]: Opinion. Filed Feb. 15, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California,

Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and Entered Feb. 15, 1915. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the eighteenth day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2466.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom

the case was heard, it is ORDERED that the Petition, filed March 12, 1915, on behalf of the plaintiff in error, for a rehearing of the above-entitled cause be, and hereby is, denied.

No. 2466.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

No. 244—CIVIL.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Stipulation Staying Issuance of Mandate Under Rule 32 to and Including October 18, 1915.

WHEREAS, The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, is preparing its petition for certiorari, which it intends to file in the Supreme Court of the United States, to have reviewed the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, filed in the above-entitled cause; and,

WHEREAS, the present term of the Supreme Court of the United States will adjourn on May 15th, 1915, and said plaintiff in error will be unable to have its said petition for certiorari filed with the Supreme Court at least three days before the adjournment of the present term; and,

WHEREAS, each of the parties hereto is desirous that the Supreme Court of the United States shall construe and interpret the particular sections of the Federal Hours of Service Act involved herein:

NOW, THEREFORE, it is stipulated by and between the respective parties hereto, the Plaintiff in Error by E. W. Camp and Paul Burks, its attorneys, and the defendant in error by Albert Schoonover, United States District Attorney, its attorney, as follows:

That the Mandate of the Circuit Court of Appeals in this cause shall be stayed until and including the third Monday in October, 1915, and that an order may be entered herein to that effect;

Provided, however, that if plaintiff in error shall not have filed its proposed petition for certiorari in the Supreme Court of the United States by and including the third Monday in October, 1915, being a day in the October, 1915, term of said court, then and in that case the mandate of the court entitled therein may issue at any time after said date.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
By E. W. CAMP,
PAUL BURKS,
Its Attorneys.

THE UNITED STATES OF AMERICA,
By ALBERT SCHOONOVER,
United States District Attorney,
Its Attorney.
By ROBERT O'CONNOR,
Asst. U. S. Attorney.

[Endorsed:] Stipulation Staying Issuance of Mandate Under Rule 32 to and Including October 18, 1915. Filed May 17, 1915. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventeenth day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK H. RUDKIN, District Judge.

No. 2466.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Staying Issuance of Mandate Under Rule 32 to and Including October 18, 1915.

On consideration of the oral motion of Mr. Thomas R. White, made on behalf of counsel for the plaintiff in error, and pursuant to the stipulation of counsel for the respective parties, this day filed therefor, and it appearing to the Court that the Interstate Commerce Commission consents thereto, and good cause

therefor appearing, it is ORDERED that the issuance of the Mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed to and including October 18, 1915.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Praecipe for Certified Transcript of Record, etc.

To the Clerk of the Said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals) and not less than thirty uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under Section 240 of the Judicial Code, in the above-entitled cause, the said Transcript to consist of a copy of the following:

1. Printed Transcript of Record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Order of Submission, entered Oct. 6, 1914.

3. Order Directing Filing of Opinion, etc., entered Feb. 15, 1915.

4. Opinion, filed Feb. 15, 1915.

5. Judgment, filed and entered Feb. 15, 1915.

6. Order Denying Petition for a Rehearing, entered March 18, 1915.

7. Order entered May 17, 1915, Staying Issuance of Mandate, etc.

8. Praecipe for Certified Transcript of Record, etc., and

9. Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript.

Please prepare thirty or more uncertified printed copies of said record by printing thirty or more copies of the above-mentioned proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings, etc., at the end of thirty or more extra copies of the printed Transcript of Record on which said cause was heard in said Circuit Court of Appeals.

E. W. CAMP.
PAUL BURKS,
Counsel for Plaintiff in Error.

[Endorsed]: Praecipe for Certified Transcript of Record, etc. Filed Sept. 4, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing seventy (70) pages, numbered from and including 1 to and including 70, to be a true copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to the praecipe of counsel for the plaintiff in error, filed therefor on the fourth day of September, A. D. 1915, and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this tenth day of September, A. D. 1915.

[Seal] F. D. MONCKTON,
Clerk.

[Canceled U. S. Internal Revenue 10-cent Documentary Stamp.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Atchison, Topeka & Santa Fe Railway Company is plaintiff in error and The United States of America is defendant in error, No. 2466, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 24,957. Supreme Court of the United States, No. 674, October Term, 1915. The Atchison, Topeka & Santa Fe Railway Company vs. The United States. Writ of Certiorari. Docketed. No. 2466. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 23, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Stipulation [of Counsel Relative to Return to Writ of Certiorari].

Whereas, the Supreme Court of the United States has heretofore granted the petition of the plaintiff in error for a Writ of Certiorari to review the record in the above cause, and under date of December

8, 1915, issues its Writ of Certiorari directing the above court to send to it the record and proceedings in the above cause, a certified copy of which said record and proceedings have heretofore been lodged in said court by the plaintiff in error. Now, Therefore,

It is hereby stipulated by and between the parties to the above entitled action that the certified copy of the record in the above entitled cause heretofore filed in the Supreme Court of the United States by the plaintiff in error as a part of its petition for a Writ of Certiorari may be taken as the return to the Writ of Certiorari issues by the Supreme Court of the United States, and that when this stipulation may have been filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit a certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States as his return to the Writ of Certiorari issued out of the Supreme Court of the United States on the 8th day of December, 1915.

Dated December 22, 1915.

(Signed) E. W. CAMP,
(Signed) PAUL BURKS,
Attorneys for Plaintiff in Error.
(Signed) ALBERT SCHOONOVER,
(Signed) MONROE C. LIST,
(Signed) P. J. DOHERTY,
Attorneys for Defendant in Error.

(Endorsed:) Stipulation of Counsel Relative to Return to Writ of Certiorari. Filed Dec. 23, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding two (2) pages, numbered from and including 1 to and including 2, to be a full, true and correct copy of "Stipulation of Counsel Relative to Return to Writ of Certiorari," filed in the above-entitled cause on the 23rd day of December, A. D. 1915, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of

Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-third day of December, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Dec. 23, 1915. F. D. M. By M. S.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2466.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari", in which said Stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on this 23rd day of December, A. D. 1915.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23rd day of December, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Dec. 23, 1915. F. D. M. By M. S.]

[Endorsed:] 674/24,957.

[Endorsed:] File No. 24,957. Supreme Court U. S., October term, 1915. Term No. 674. The Atchison, Topeka & Santa Fe Railway Company, Petitioner, vs. The United States. Writ of certiorari and return. Filed January 3, 1916.

Office Supreme Court, U. S.
FILED
OCT 16 1915
JAMES D. MAHER
Clerk

No. 267

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Petition of the Atchison, Topeka and Santa Fe Railway Company, a corporation, for a Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

PETITION FOR CERTIORARI.

ROBERT DUNLAP,
E. W. CAMP,
PAUL BURKS,
Attorneys for Petitioner.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Petition of the Atchison, Topeka and Santa Fe Railway Company, a corporation, for a Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

NOTICE OF MOTION.

Sirs:

Please take notice that upon a certified copy of the transcript of the record herein, and upon the annexed petition of The Atchison, Topeka and Santa Fe Railway Company, sworn to on the ..8th day of October, 1915, the petitioner will move the motion hereto annexed before

the Supreme Court of the United States at the capitol in the city of Washington, District of Columbia, on Monday, the 15th day of November, 1915, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that it will then and there move for such further relief in the premises as may be just.

Dated, Los Angeles, California, October 8th, 1915.

ROBERT DUNLAP,
E. W. CAMP,
PAUL BURKS,
Attorneys for Petitioner.

To Albert Schoonover, Monroe C. List and Philip J. Doherty, Attorneys for Defendant in Error and to The United States of America.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Petition of the Atchison, Topeka and Santa Fe Railway Company, a corporation, for a Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

MOTION.

Now comes the petitioner above named, by Robert Dunlap, E. W. Camp and Paul Burks, its attorneys and counsel, and moves this court, upon a certified copy of the transcript of the record herein, and upon the annexed petition sworn to the 8th day of October, 1915, for a *writ of certiorari* directed to the Circuit Court

of Appeal for the Ninth Circuit, to bring before this Honorable Court the case of *The Atchison, Topeka and Santa Fe Railway Company*, a corporation, plaintiff in error, against *The United States of America*, defendant in error, recently decided by said Circuit Court of Appeal for the Ninth Circuit, for such proceedings therein as to this Honorable Court may seem just, and for such other and further relief in the premises as may be just.

ROBERT DUNLAP,
E. W. CAMP,
PAUL BURKS,
Attorneys and Counsel for Plaintiff in Error and Petitioner.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Petition of the Atchison, Topeka and Santa Fe Railway Company, a corporation, for a Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

PETITION FOR CERTIORARI.

To The Supreme Court of the United States:

Your petitioner respectfully prays for a *writ of certiorari* to review the judgment of the United States Circuit Court of Appeal for the Ninth Circuit affirming a judgment in favor of the plaintiff in the case of the *United States of America* versus *The Atchison, Topeka*

and Santa Fe Railway Company, and carried to said Circuit Court of Appeal by writ of error, and respectfully shows to this court as follows:

STATEMENT OF THE CASE.

I.

That your petitioner was at all of the times hereinafter mentioned, and is now, a corporation duly organized and existing under the laws of the state of Kansas, and at all of said times was, and now is, a common carrier engaged in interstate commerce by railroad in and between the states of Arizona and California, among others, and was at all of such times, and still is, subject to the provisions of an Act of Congress entitled *"An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon,"* approved March 4, 1907 (34 St. L. 1415), effective March 4, 1908 (hereinafter referred to as the "Hours of Service Act"). Said Act insofar as it affects the questions here involved, provides:

> "Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee, subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen

hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, that no operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hours period on not exceeding three days in any week. * * * ."

The third section provides the penalties for violations of the provisions of section 2 and for prosecutions of such violations, and contains two provisos, the first of which is as follows:

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen." * *

"Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to said Interstate Commerce Commission are hereby extended to it in the execution of this Act."

II.

That this action was brought against your petitioner to recover penalties aggregating $1,500 for three alleged violations of said Hours of Service Act. The complaint was filed March 7, 1913, in the United States District Court for the Southern District of California, Southern Division, where this cause was docketed as No. 244-Civil, and it is set forth that the action was brought by the United States of America, as plaintiff, upon the suggestion of the Attorney General of the United States at the request of and upon information furnished by the Interstate Commerce Commission. In its three separate causes of action the complaint sets forth that the conductor and two brakemen were, as members of the crew of petitioner's train No. 17, required and permitted to be and remain continuously on duty between Parker, Arizona, and Los Angeles, California, from 10:40 p. m., October 2, 1912, until 8:25 p. m., October 3, 1912, and in excess of sixteen hours.

III.

That by its answer petitioner admitted that said employees had been permitted to remain on duty substantially as alleged, but set up as an affirmative defense that such service was not unlawful because of the proviso in section 3 of said Hours of Service Act as theretofore construed by the Interstate Commerce Commission, as shown by the facts set forth in its answer as follows:

> "That said station of Parker is a terminal of this defendant and the terminal from which said employees were engaged by this defendant to operate and accompany said train to the city of Los Angeles, in the state of California, which is the terminal to which said employees were destined at the time stated in the complaint; that the schedule and usual time of said train in going from said Parker to said Los Angeles is and was at the times mentioned in said complaint much less than 16 hours, to-wit, 11 hours and 5 minutes, and that said train would, at the time mentioned in said complaint, have made said run in about 11 hours and 5 minutes, and in much less than 16 hours, but for certain casualties and unavoidable accidents, and for certain causes which could not have been foreseen by and were not known to said defendant, or any of its officers or agents, at the time when said crew left said terminal at Parker; that is to say, said train was delayed at certain stations between Cadiz and Barstow by reason of congestion of trains due to certain washouts caused by storm

waters shortly before the passage of said train, which washouts had delayed a number of passenger trains on the main line of this defendant, congesting all traffic on said line and causing necessary delay to all trains; but that said delays, aggregating 2 hours and 30 minutes before reaching the station of Barstow would not have caused said crew to exceed the time of 16 hours in reaching said station of Los Angeles.

"Said train left Barstow at 7:45 a. m. October 3, and shortly thereafter, at 8:30 a. m., an axle broke under the tank of the engine of said train, whereby said train was delayed 6 hours and 10 minutes, although every effort was made to remedy the accident and proceed at the earliest possible moment; that the breaking of the axle was a casualty and unavoidable accident, and was the result of causes which were not known to this defendant, or any of its officers or agents, when said engine left its terminal, to-wit, said station of Barstow, and that said casualty could not have been foreseen when said engine left said Barstow."

IV.

That said cause came on regularly for hearing on June 17, 1914, before the court without a jury, a jury trial having been duly waived by the parties, upon a stipulation as to facts, the substance of which (omitting formal and immaterial portions) was as follows:

1. That at all the times hereinbefore mentioned defendant and petitioner, a Kansas cor-

poration, as owner of Santa Fe Railway System, operated as a common carrier, a main line of railway extending from Chicago, Illinois, to Los Angeles, California, together with numerous branches, over one of which (extending from Cadiz, California, through Parker, Arizona, to Phoenix, Arizona, and known as the Arizona and California branch), it operated in interstate commerce and over various operating divisions between Phoenix, Arizona, and Los Angeles, California, certain passenger, mail and express trains known as "Phoenix Express" and known as trains number 17 and 18. [Tr. pp. 17-9.]

2. That customarily and upon dates mentioned in the complaint, train number 17, described in the complaint, moved from Phoenix, Arizona, over Santa Fe, Prescott and Phoenix lines and in charge of the employees of that branch, to Parker, Arizona, where the train was to be taken in charge and handled to Los Angeles, California, a distance of 335.3 miles, by another "passenger train crew" consisting of the conductor and two brakemen described in the complaint. The run of the engine crew which took the train at Parker extended to Barstow, a distance of 183.5 miles. [Tr. pp. 19-20.]

3. That on October 2 and 3, 1912, the passenger crew in charge of said train number 17

was required and permitted to be and remain on duty in connection with the movement thereof from 10:40 o'clock p. m. on October 2, until 8:25 o'clock p. m. on Oct. 3, 1912, because of the circumstances set forth in defendant's answer. [Tr. p. 20.]

4. The employees involved reported for duty at Parker, Arizona, at 10:40 o'clock p. m. October 2, and at 11:10 p. m. on said date departed in charge of the train for Los Angeles, between which points the crew were usually on duty for a period of 11 hours and 35 minutes, as appeared from the schedule found on page 35 of the transcript, which shows the usual running time on the days mentioned in the complaint, the distance between the principal stations through which the train passed, the distance of each of said stations from Parker and the hours the said employees had been on duty at the time of their departure from said stations, at all of which there were side tracks of capacity sufficient to accommodate the train and telegraph offices continuously operated day and night and which were continuously in touch with the office of the defendant's chief dispatchers, either at Needles or at San Bernardino, depending on the operating division over which the train was run. [Tr. pp. 20-2.]

5. That the terminals of the passenger crews engaged in the moving and operating of said

trains number 17 and 18 were Los Angeles, California, and Parker, Arizona; that the employees described in the complaint resided and had their homes in Los Angeles, from which point they customarily, and immediately previous to the time in question, left for Parker, Arizona, in charge of train number 18, which arrived at Parker at about 1:15 a. m. on October 2, whereupon the passenger crew was relieved from duty until 10:40 o'clock p. m. on said date, during which time they were not performing any service or held responsible for any service should the occasion therefor arise, and during which time they were permitted to enjoy accommodations of rest and food with which they had provided themselves at their "away-from-home-terminal" at Parker. That customarily and at or about the time mentioned in the complaint, the passenger crew in charge of said train number 17 would reach Los Angeles about 10:15 o'clock a. m., from which time until 1:30 o'clock p. m. on the day following they were not performing or held responsible for the performance of any service should occasion therefor arise, but were permitted to repair to their respective homes in Los Angeles, which was their "home-terminal." [Tr. p. 22.]

6. That said train number 17 left Parker, Arizona, at 11:10 o'clock p. m. on October 2,

and arrived at Barstow, California, at 7:10 o'clock a. m. October 3, after having been delayed between Cadiz and Barstow for a period of 2 hours and 30 minutes on account of washouts, which delays and the causes thereof were not known to the defendant, or any of its officers or agents in charge of the employees, in charge of said train at the time such employees left Parker, and which could not have been foreseen. [Tr. p. 23.]

7. That said train number 17 was scheduled to leave Barstow at 4:45 o'clock a. m. on October 3, but by reason of the delay in said train in reaching Barstow due to washouts, said train after changing engines actually left Barstow at 7:45 o'clock a. m., but with ample time remaining to reach Los Angeles within the sixteen hours from the time the employees in charge thereof entered upon their service, but that at 8:30 a. m. on October 3, and while said train was being operated between Barstow and San Bernardino, an axle broke under the tank of the engine after said train had reached a point between Bryman and Oro Grande, with the result that the movement of said train was necessarily and unavoidably delayed for a period of 6 hours 10 minutes, with the further result that said train, instead of reaching San Bernardino at 7:35 a. m., according to its usual schedule, or at 10:35 a. m., as it would have

done but for the delays in reaching and leaving Barstow, actually arrived at San Bernardino at 5:30 p. m., and that instead of reaching Los Angeles at 10:15 a. m., in accordance with its usual schedule, or at 1:16 p. m., as it would have done but for the delays in reaching and leaving Barstow had there been no further delay, actually reached Los Angeles at 8:25 p. m. on October 3d, said employees having then been on duty for 21 hours 45 minutes, but that the breaking of the axle whereby said train was delayed for a period of 6 hours 10 minutes between Bryman and Oro Grande was a casualty and an unavoidable accident and that the delay to said train caused thereby was the result of causes which were not known to defendant, or to any of its officers or agents in charge of said employees, at the time said employees left said terminal of Parker, and which could not have been foreseen. [Tr. pp. 23-4.]

8. That the said train No. 17, after having been delayed in reaching and leaving Barstow, as hereinbefore described, and after having been delayed for a further period of 6 hours 10 minutes by said broken axle, as hereinbefore described, proceeded to the city of Los Angeles in charge of the employees in whose charge said train had left Parker, and that in going to Los Angeles said train and said employees passed through the station of San Bernardino,

California, which is a point known and designated as a division terminal and which was a place appointed and customarily used as a terminal from and to which crews of certain other passenger and freight trains of the defendant brought their trains, but which was not a terminal for the passenger train crews in charge of said trains Nos. 17 and 18 or of any other of defendant's trains operating between said station of Parker and said station of Los Angeles, and at and previous to the time the said employees in charge of said train No. 17 had been continuously on duty for a period of 16 hours, defendant had in its employ at Los Angeles and also San Bernardino passenger train crews which were customarily assigned to other passenger trains and crews which were subject to call which were customarily used in operating freight trains who were qualified should necessity require to operate passenger trains between San Bernardino and Los Angeles. That the employees in charge of said train No. 17 could have been relieved at San Bernardino and said train placed in charge of one of such other freight or passenger train crews at a time which would have permitted the employees in charge of said train No. 17 to dead-head from San Bernardino to Los Angeles, California, on said train No. 17, without performing any service and without being held

responsible for the performance of any service in connection with the movement of said train No. 17 should the occasion therefor arise. That the effect of the breaking of the axle upon the tank of the engine which was hauling said train No. 17 was to block the defendant's main line between said stations of Bryman and Oro Grande, which rendered it necessary to send from San Bernardino to the point where said axle broke and where said line was blocked a "wrecking crew," which said crew, in addition to the other equipment which it required to open said main line for traffic, had with it what is known as a portable telephone, by means of which communication was established between San Bernardino and the point where said line was blocked. [Tr. pp. 24-6.]

9. That before the delay of 6 hours 10 minutes which resulted from said broken axle had expired, and before the damage which had caused such delay had been repaired, and before the said train left the point where such damage occurred, it was known to the defendant and to its officers and agents in charge of said employees mentioned in said complaint that such employees would have been on duty in excess of 16 hours by the time said employees reached San Bernardino, but that no effort was made to relieve said employees before they had been continuously on duty in excess of 16 hours,

either previous to or at the time of their arrival at San Bernardino, or at any time before said employees reached Los Angeles. [Tr. p. 26.]

10. That it is commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains that the word "terminal" has reference to certain train or trains or certain crew or crews and means the beginning or the end of the employe's run or the point at which in the regular course of business he would go on duty as a member of a particular crew, or at which in the regular course of business he would cease to be a member of such crew of a particular train and be relieved from duty. In other words, the point at which he becomes a member of a train crew in charge of a particular train and the point to which it was intended at the time when he became a member of such crew of such train that he should accompany such train as a member of such crew; and that it is not generally understood among railroad men that the word "terminal" as applied to any particular train or the crew thereof refers to a relay or division point between the point at which an employee became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay

or division point may have been the point of departure, the end of the run, or the terminal for other crews and other trains. [Tr. pp. 26-7.]

11. That the failure of this defendant to make any effort to relieve the said employees before they had been continuously on duty for a period in excess of 16 hours or at any time before said employees reached Los Angeles was due to the understanding and belief of the officers and agents in charge of such employees that the delay to said train by reason of said casualties and unavoidable accidents justified the retention in service of said employees until they should have taken said train through to the home terminal of said employees at Los Angeles, California, and to the belief that the retention in service of said employees in excess of 16 hours was the result of a casualty and unavoidable accident, and that the delay to said train and any excess service on the part of such employees which may have resulted from said delay to said train was the result of causes not known to defendant, or to any of its officers or agents in charge of such employees at the time said employees left their away-from-home terminal at Parker, and which could not have been foreseen. [Tr. pp. 27-8.]

12. That the railway of defendant is customarily and at the times mentioned in the

complaint was a well managed railway, operated in accordance with the best known custom and usage prevailing among well operated railways throughout the United States, and that said defendant considered it desirable and in accordance with custom and usage prevailing upon defendant's and other well operated railroads, from the point of view both of said railway and of its employees in question, that they should be permitted at the earliest opportunity to reach their home terminal at Los Angeles where they might rest at their respective homes before being again required to go on duty. [Tr. p. 28.]

13. That under date of March 16, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the Hours of Service Act (34 St. L. 1415) in words and figures as follows:

> (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Rule 88.)
>
> "Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or

unknown. (Words and Phrases Judicially Defined, Vol. 2, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains and care reasonable to have been expected. (Bouvier's Law Dictionary, Vol. 1, 79.) [Tr. p. 29.]

That under date of May (*June*) 25, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the Hours of Service Act (34 St. L. 1415) in words and figures as follows:

(b) Section 3 of the law provides that: "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

"Any employe so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See Rule 287.) [Tr. p. 30.]

19. That in its annual report to Congress dated December 24, 1908, the Interstate Commerce Commission, in referring to the hours of service law, said:

"THE HOURS OF SERVICE LAW.

"The federal hours of service act was approved March 4, 1907, to become effec-

tive one year from the date of its enactment. * * *

"The law became effective on the 4th of March, 1908. * * *

"Questions immediately arose as to its proper interpretation. With a view to explaining, in so far as possible, those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings:

* * * * * * * *

"Section 3. The exemptions prescribed by this section contemplate only such accidents as could not by the exercise of diligence on the part of the carriers, their agents, or officers, have been anticipated and prevented.

"Employees performing excess service are not liable to the penalties provided by the act.

"Employees unavoidably delayed by reason of causes that could not, at the commencement of a trip have been foreseen, may lawfully continue on duty to the terminal or end of that run." * * *

"Another criticism in regard to the act under consideration has reference to section 3 thereof, that:

"'The provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God;

"Presuming upon these exceptions, carriers have endeavored to explain their failures to comply with the law by a variety of reasons which, in the opinion of the Commission, are not emergencies such as were contemplated by Congress in the drafting of the statute. Among these excuses may be mentioned 'leaky valves,' 'hot boxes,' 'drawheads pulled out,' 'engine

failures' from various causes not explained, 'broken air hose,' etc., some of which have resulted in detaining men on duty for continuous periods of more than forty-one hours.

"It is respectfully suggested that the law in this particular should, so far as possible, be made specific, so as to restrict the exercise on the part of carriers of discretion in determining whether or not a given incident is a 'casualty' or 'unavoidable accident' within the meaning of the act; or that some one should be designated and empowered to decide all such questions.

"While the Commission is practically convinced that the act in its present form confers upon it all the power necessary to effect the objects for which it was adopted, still its terms are susceptible of more than one interpretation. Hence controversies must necessarily arise and while such questions can, of course, after the usual period of litigation be judicially determined, their settlement by such means will entail a large expense upon the government, as well as considerable delay in attaining the full measure of benefit which the law should reasonably afford. It is therefore desirable that Congress should, by a few lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise." [Tr. pp. 30-3.]

V.

That after a hearing thereof upon said agreed statement of facts, said cause was duly argued and submitted and upon June 22, 1914, judg-

ment therein was rendered in favor of the plaintiff and against your petitioner for $100.00 on each of the three causes of action in said complaint set forth. The trial judge having failed to file or announce any opinion precedent to the ordering of said judgment, it is impossible to state the conclusions which he reached in arriving at said judgment, save and except as they are reflected by said judgment itself. [Tr. pp. 14-5.]

VI.

That thereafter your petitioner, as plaintiff in error, within the time and in the manner and form provided by law, and by the rules of said court, duly and regularly prosecuted a writ of error to the United States Circuit Court of Appeal for the Ninth Circuit, wherein said cause was duly docketed as No. 2466 and that all legal formalities and rules of court with respect to the prosecution and submission of said writ of error were duly observed and thereafter on February 15, 1915, said court filed its opinion (220 Fed. 748) affirming the judgment thus submitted to it for review, and which (omitting formal parts), follows:

[TITLE OF COURT AND CAUSE. NO. 2466.]

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, delivered the opinion of the court:

> "The plaintiff in error is charged in the complaint filed by the United States with having permitted three of its employees to be and remain on duty for a longer period than sixteen hours, to-wit: from the hour of 10:40 p. m. on October 2nd, 1912, to the hour of 8:25 p. m. on October 3rd, 1912. It appears from the stipulated facts filed in the court below that the employees of the plaintiff in error were employed as conductor and brakemen, respectively, on one of the trains of the plaintiff in error running between Parker, Arizona, and Los Angeles, California; that the employees went on duty at Parker, Arizona, at 10:40 p. m. on October 2nd, 1912; that the train on which they were employed left Parker at 11:10 p. m. of that date and arrived at Barstow, California, at 7:10 a. m. on October 3rd, 1912, having been delayed between the two points for a period of two hours and thirty minutes on account of washouts; that the train left Barstow, California, at 7:45 a. m. on October 3rd, with ample time then remaining to reach Los Angeles within less than sixteen hours from the time the employees entered upon their duties, but while the train was being operated between Barstow and San Bernardino an axle broke under the tank of an engine whereby the movement of the train was unavoidably delayed for a period

of six hours and ten minutes, with the result that the train reached San Bernardino at 5:30 p. m. and Los Angeles at 8:25 p. m. on October 3rd, the employees having then been on duty for twenty-one hours and forty-five minutes; that before the delay of six hours and ten minutes caused by the broken axle had expired, and before the damage which caused the delay had been repaired, and before the train left the point where such delay occurred, it was known to the plaintiff in error that its employees would have been on duty in excess of sixteen hours by the time the train reached San Bernardino; but no effort was made to relieve the employees before they had been on duty in excess of sixteen hours, either previous to or at the time of their arrival at San Bernardino, or at any time before the employees reached Los Angeles; that San Bernardino was a division terminal but was not a terminal for the employees of the train involved in this proceeding, but the employees of the plaintiff in error could have been relieved at that place and the train placed in charge of another crew.

"The position taken by the plaintiff in error is, that the facts above set forth constitute no violation of the statute for the reason that the terminal of its train was Los Angeles and it was entitled to permit its employees to be and remain on duty until that terminal was reached, regardless of whether the sixteen hour period prescribed by the statute had expired. The government's contention is, that where delays have occurred the employees may continue to operate the train, but that they can not be held in service beyond the six-

teen hour period prescribed by the act if a suitable stopping place should be reached at which they may be relieved; and that if such a place is reached and the employees are not relieved, there is a violation of the law.

"The positions taken by each of the parties in the present action, and the arguments advanced in support of those positions, are in all substantial respects identical with the positions and arguments of the parties in the case of The San Pedro, Los Angeles and Salt Lake Railroad Company v. The United States of America, 220 Fed. 737, decided by this court on February 1st, 1915. On the authority of that case the judgment of the court below is affirmed."

(Endorsed:) Opinion. Filed Feb. 15, 1915.

The opinion in the case last above referred to, insofar as it relates to the questions common to both cases (omitting, for brevity's sake, quotations from said Hours of Service Act as hereinbefore quoted and the formal and irrelevant portions) is submitted herewith as "Appendix I."

That, within the time prescribed by the rules of said court, your petitioner, on March 12, 1915, filed in said United States Circuit Court of Appeals its petition for a re-hearing of said cause, which was on March 18, 1915, denied. [Tr. p. 65.] That thereafter, upon application of your petitioner, which was acquiesced in by

the defendant in error, said United States Circuit Court of Appeals did by appropriate orders [Tr. pp. 66-68] direct that the issuance of its mandate in said cause be stayed until October 18, 1915, to enable your petitioner to apply to Your Honorable Court for a writ of *certiorari* to review its said decision and opinion which by law is made final subject only to review by Your Honorable Court.

A certified copy of the entire record of said cause is herewith furnished as a part of this application, in conformity with Rule 37 of this Honorable Court relative to "Cases from Circuit Courts of Appeals" and is marked "Exhibit A."

BASIS OF APPLICATION.

Your petitioner presents to this court for the first time certain questions and propositions of law which are of gravity and of nation-wide importance, involving the proper construction of the proviso found in section 3 of the Hours of Service Act respecting which there is such a lack of uniformity of rulings among the District Courts and Circuit Courts of Appeals as to render the action of a tribunal of last resort particularly desirable inasmuch as such construction vitally affects not only all carriers subject to said act, but their employes as well.

QUESTIONS OF LAW.

These questions and propositions, all of which were fully urged in both courts below, may be summarized as follows:

First: It is respectfully submitted that there is error in the decision in the instant case as follows:

(a) It nullifies and deprives of its obvious meaning and defeats the clear purpose of that part of said Hours of Service Act reading:

> *"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. * * *"*

(b) It imposes upon carriers subject to said Hours of Service Act requirements in addition to those imposed by said act itself and subjects such carriers to the penalties of the act in those cases and under those circumstances where by its express terms *"the provisions of this act shall not apply."*

(c) It imposes upon such carriers, arbitrarily and without legislative sanction, the duty of relieving from service employees who are delayed by causes and under circumstances which, by the clear terms of said act toll the

operation thereof and render its provisions no longer applicable.

(d) It makes an act which, by the expressed will of Congress, was clearly not an offense *when* it was performed, an offense *after* its performance.

(e) It substitutes the construction of the court for the practical contemporaneous construction put upon the act by the administrative body expressly empowered *"to execute and enforce its provisions:"* and, also, nullifies, sets aside and holds for naught, without clear or cogent reasons, the Interstate Commerce Commission's administrative ruling No. 88 of June 25, 1908, which was promulgated as a rule for the guidance of carriers subject to said act, reported to Congress, as such, by the Commission.

(f) The decision in the instant case and in the Salt Lake case are at variance with the decision of the same court in the case of United States v. Northern Pacific Railway Company, 215 Fed. 64-67, because in the case last mentioned, the court after having found that the delay was the result of a casualty and a cause which could not have been foreseen refused to hold that there was imposed upon the employer the duty to relieve the employes thus delayed.

Second: It is respectfully urged that the court erred in holding that your petitioner vio-

lated said Hours of Service Act by requiring and permitting its employes to remain on duty until the completion of their journey to their *home terminal* at Los Angeles, in view of the plain terms of the proviso of said act hereinbefore quoted, and in view of the Interstate Commerce Commission's unrescinded and unmodified administratrive ruling No. 88 of June 25, 1908, positively declaring that any employe delayed by the causes or under the circumstances mentioned in such proviso

> "* * * *may, therefore, continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip.*"

and more especially in view of the government's express admission

> *"that the breaking of said axle whereby said train was delayed for a period of 6 hours and 10 minutes between Bryman and Oro Grande was a casualty and an unavoidable accident, and that the delay to said train caused thereby was the result of causes which were not known to defendant, or to any of its officers or agents in charge of said employes at the time said employes left said terminal of Parker and which could not have been foreseen."* [Tr. p. 24.]

In support of this petition and for the convenience of the court, your petitioner herewith submits the following

BRIEF AND ARGUMENT.

UNDISPUTED FACTS.

The record in this case affirmatively establishes:

1. That the Hours of Service Act (34 St. L. 1415), approved March 4, 1907, became effective "one year after its passage," or on March 4, 1908, and that in said act it was provided that *"It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."*

2. That on March 16, 1908, said Commission promulgated its administrative ruling No. 287, wherein, with reference to section 3 of said act, it said [Trans. p. 29]:

> *"The instances in which the act will not apply include only such occurrences as could not be guarded against, those which involve no neglect or lack of precaution on the part of the carrier, its agents or officers, and they serve to waive the application of the law to employes on trains only until such employees so delayed reach a terminal or relay point. * * * "*

3. That thereafter on June 25, 1908, said Interstate Commerce Commission promulgated its administrative ruling No. 88 wherein, with

reference to said section 3 of said act and after quoting the proviso thereof, it said [Tr. p. 30]:

> *"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."*

4. That on December 24, 1908, said Interstate Commerce Commission submitted to the Congress of the United States its 22d annual report, and in that portion thereof which refers to section 3 of said Hours of Service Act there is no reference to or quotation from said earlier administrative ruling No. 287 of March 16, 1908, but that said report does set forth, as embodying an interpretation placed upon the proviso in section 3 of said act by the body charged with its administration for the guidance of those subject to the act, the substance of its latter administrative ruling No. 88 of June 25, 1908, in the language following:

> *"Employes unavoidably delayed by reason of causes that could not, at the commencement of a trip have been foreseen, may lawfully continue on duty to the terminal or end of that run."* [Tr. p. 32.]

6. That there was before both the trial court and the Circuit Court of Appeals the express admission on the part of the government in the stipulation as to facts [Tr. pp. 23-4] that the train described in the complaint after leaving

Parker at 11:10 p. m. on October 2, 1912, "instead of reaching Los Angeles at 10:15 a. m., in accordance with its usual schedule, or at 1:16 p. m., as it would have done but for the delays in reaching and leaving Barstow had there been no further delay, actually reached Los Angeles at 8:25 p. m. on October 3, said employes having been on duty for 21 hours 45 minutes, *but that the breaking of the axle whereby said train was delayed for a period of 6 hours 10 minutes between Bryman and Oro Grande was a casualty and an unavoidable accident and that the delay to said train caused thereby was the result of causes which were not known to defendant or to any of its officers or agents in charge of said employes at the time said employes left said terminal of Parker, and which could not have been foreseen.*

7. That there was likewise before both of said courts below the further admission on the part of the government:

> *"That it is commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains that the word 'terminal' has reference to certain train or trains or certain crew or crews, and means the beginning or the end of the employes' run or the point at which in the regular course of business he would go on duty as a member of a particular crew, or at which in the regular course of business he*

would cease to be a member of such crew of a particular train and be relieved from duty. In other words, the point at which he becomes a member of a train crew in charge of a particular train and the point to which it was intended at the time when he became a member of such crew of such train that he should accompany such train as a member of such crew; and that it is not generally understood among railroad men that the word 'terminal' as applied to any particular train or the crew thereof refers to relay or division points between the point at which an employe became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of a run, or the terminal for other crews and other trains."

8. That before said train left the point where it had been delayed for 6 hours 10 minutes by the broken axle it was known to petitioner that the employes would have been on duty more than sixteen hours when they arrived at San Bernardino, which, although a division terminal from and to which crews of certain other passenger and freight trains operated, was not a terminal for the crew of the passenger train in question but at which, as well as at Los Angeles, there were other train crews qualified to relieve the particular crew in question and bring its train through to Los Angeles had the

law so required. No effort was made to relieve the employes mentioned in the complaint, either before, or at, or after their arrival at San Bernardino because of petitioner's understanding and belief based upon the Commission's Administrative Ruling No. 88 of June 25, 1908, that the delay occasioned by the broken axle (which it was thereafter admitted by the government constituted a "casualty" and an "unavoidable accident" and the result of causes not known to petitioner when such employes commenced their trip and which could not have been foreseen) justified the retention of such employes in service until they should have brought their train *to their home terminal or end of that run* at Los Angeles.

9. That petitioner's railway is a well managed railway operated in accordance with the best known custom and usage prevailing among well-operated railways throughout the United States and that petitioner considered it desirable, from the point of view both of said railways and of its employes in question, and in accordance with custom and usage prevailing upon its own and other well-operated railways and with the Commission's ruling of June 25, 1908, that they should be permitted at the earliest opportunity to reach their home terminal at Los Angeles where they might rest at their respective homes before being again required to go on duty.

ARGUMENT.

MEANING OF "TERMINAL."

The word "terminal," as used in the proviso of section 3 of the Hours of Service Act, has a commonly understood and accepted meaning among railroad men throughout the United States and it is set forth in the stipulation as to facts [Tr. 26-27], that it means the beginning of end of the employe's run—*"the point at which in the regular course of business he would cease to be a member of such crew of a particular train and be relieved from duty."*

It cannot be successfully disputed that when Congress passes a statute dealing with railroads, and especially dealing with the trainmen employed by such railroads; and in the act expressly imposes upon a commission whose business it is to deal with railroads the duty *"to execute and enforce the provisions of this act,"* then the word in question is to be taken in the sense which custom and usage have thus given it.

Ex parte Hall, 18 Mass. (1 Pick.) 261;
Green v. Weller, 32 Miss. 650;
Quigley v. Gorham, 5 California 418.

That the agreed definition of the word "terminal" as used in said act just quoted is in strict accord with the intent of Congress in its use in said act will appear by reference to Con-

gressional Record 59th Congress, second session, part I, pp. 822-3, 768.

It is well understood that the reason why Congress allowed one year between the passage and the taking effect of the Hours of Service Act, was to permit the railways effected thereby to make necessary arrangements of their "terminals," as the word is used in the act, and other readjustments which might be necessary in order that the runs of trainmen might fit the prescribed 16-hour limit, and when it issued its Administrative Ruling No. 88 of June 25, 1908, the Interstate Commerce Commission doubtless knew that carriers subject to the act had established exclusive relay points for engine crews, for freight crews and for passenger crews and local as well as through passenger crews respectively and has so arranged the runs of such crews as to secure compliance with the act and there is nothing in any ruling of the Commission which indicates any desire of intention on its part to disturb the arrangements and readjustments so made. In fact, nowhere from the inception of the act down has it ever been suggested that the word *"terminal"* had any other meaning in the law than the end of the appointed run. This construction is supported by the stipulated definition hereinbefore set forth and especial attention is again directed to the fact that in its first report to Congress after the

effective date of the act the Interstate Commerce Commission said:

> *"Employees unavoidably delayed by reason of causes that could not at the commencement of the trip have been foreseen may lawfully continue on duty to the terminal or end of that run."*

In none of its later reports to Congress has the Commission suggested that any other interpretation might properly be put upon the language of the proviso in question or that it had in mind to apply any other construction. It was and is the enforcer of the law.

What we have said with respect to the construction to be given to the word *"terminal"* and the action of the Interstate Commerce Commission is better stated in the well reasoned opinion of United States District Judge Sawtelle in the case of *United States v. Atchison*, 212 Federal 1000, which involved a case of delay to an opposite train to that here involved while en route from Los Angeles to Parker, which decision is submitted in full herewith as "Appendix II."

By its opinion in this case the Circuit Court of Appeals sustained the government's opposition to the argument hereinbefore advanced by holding that administrative ruling No. 88 of June 25, 1908, must be read in connection with

the preceding administrative ruling 287 of March 16, 1908.

A conclusive answer to this view is that the two rulings are wholly irreconcilable but even if they could be read in connection with each other without doing violence to the plain wording of the proviso, the failure of the commission to make any mention of the earlier ruling in its report to Congress, wherein there was clearly set forth the substance of the later ruling, certainly evidences an intention on the part of the commission to abandon the earlier ruling and to adopt as its interpretation of the proviso the declaration that *"any employe so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removed the application of the law to that trip."* No ambiguity exists in this expression. The words employed are so plain, simple, direct and expressive as to leave no doubt as to their meaning. By it the "terminal" is fixed at the "end of the run" or "trip." "Run" and "trip" are used interchangeably and each term serves to emphasize the other. If, therefore, the two rulings of the commission referred to in the opinion of the Circuit Court of Appeals are conflicting and inconsistent, then to the extent of the inconsistency the later ruling must prevail; and if it be insisted that the necessary effect of the earlier ruling was to require carriers to

relieve employes at any terminal or relay point short of *the end of the run or trip,* then, clearly, the earlier ruling must fall; for the two rulings can not stand together, because in the later ruling it is expressly declared that *"any employe so delayed may thereafter continue on duty to the terminal or end of the run. The proviso quoted removes the application of the law* TO THAT TRIP." And the later ruling, which is the only one ever reported to Congress and which was acquiesced in by Congress as evidenced by its failure to amend or clarify the act, became for your petitioner an integral part of the law to a like extent as though it had been expressly incorporated therein, and for the courts now to declare that such construction does not apply to an act done while such construction remained in effect is not only to brand as a law-breaker a railway company which was acting in good faith upon the interpretation so given by the commission to the law, but is also to deprive it of its property.

Regardless of the Meaning of the Word "Terminal", the Construction Given by the Court to the First Proviso of Section 3 is Erroneous.

We have thus far discussed this case as if its correct decision turned upon the meaning of the word "terminal"; but there is still another

ground which demands the review hereby sought.

The word "terminal" or the phrase "left a terminal" can not be carried back to modify the first part of the proviso preceding the semicolon. The statement that *"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; * * *"* stands without any modification. The phrase *"left a terminal"* applies only to that part of the proviso which deals with causes not known to the carrier at the time the employee left a terminal and which could not have been foreseen.

It is manifest that a proviso relating to the leaving of a terminal can have no possible relation to the service of telegraph operators and train dispatchers, and yet the same proviso applies to those operatives as well as to train men.

Clearly it was within the power of Congress "to prohibit the application of all or of only part of the provisions of the act in cases of casualty, unavoidable accident and acts of God," but it made no exception, and the rule, without question, is that where a legislative body makes no exception to a general and clear declaration of its will it will be conclusively presumed that it intended to make none, and it is not the province of the court so to do.

The clear purpose and effect of the proviso

in section 3 of the Hours of Service Act is to provide for two distinct sets of circumstances upon the happening of either of which all of the provisions of the act are suspended and rendered no longer applicable:

FIRST: Those cases where the excessive service is due to casualties or to unavoidable accidents or to acts of God; and

SECOND: Those cases wherein delays resulting in such excess service are the result of a cause such as a washout, not known to and which could not have been foreseen by the carriers or the officers or agents at the time the employes so delayed left a terminal and commenced the journey which they are thus prevented from completing within the period limited by the act.

It is manifest, therefore, that the first part of the proviso must be read just as if it ended with the words "Act of God;" and that if it be established in any case either (1) that an employee is prevented by any casualty or unavoidable accident or act of God from completing within sixteen hours any trip upon which he has started; or (2) that a delay which prevents the completion of such trip within sixteen hours is the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal—

started on such trip—and which could not have been foreseen *then, and in either of such events none of the provisions of the act apply to such employee and he may complete his journey without subjecting his employer to the penalty of the act.*

Therefore, because it was so stipulated and because the court found not only that the breaking of the axle was a casualty and an unavoidable accident but also that the delay to the train occasioned by such casualty was the result of causes not known to petitioner or to any of its officers or agents in charge of the employees in question at the time they started from Parker to Los Angeles and which could not have been foreseen, none of the provisions of the act can apply to the tour of duty in question because *the effect of the broken axle was to suspend the operation of said act and to render its provisions no longer applicable to the employees so delayed.*

In the case of *United States v. Mo. Pac. Ry. Co.*, 213 Fed. 169, the Circuit Court of Appeals for the Eighth Circuit, per Mr. Justice Sanborn, said (pp. 172-173):

> "The expressed terms of section 3 make every common carrier liable for a penalty of $500.00 for every violation of section 2, and declare that none of the provisions of the act shall apply in any case of casualty, unavoidable accident or the act of God.

> If none of the provisions of the act apply in any case of casualty, unavoidable accident or act of God, then the provisions of the act which prohibit the service of telegraph operators and train dispatchers * * * do not apply in such cases, and so it is that the unambiguous terms of the act expressly declare that the limitations of the hours of service of telegraphers and train dispatchers in section 2 have no application in any case of casualty, unavoidable accident or act of God. * * *"

The same court in the case of United States v. Kansas City Southern Ry. Co., 202 Fed. 829 (834), holds that while delays due to causes incidental to operation "are not, standing alone, valid excuses within the meaning of this proviso, the carrier must go further and show that such delay could not have been foreseen and prevented by the exercise of the high degree of diligence demanded," and from this it would seem to follow that the view of that court is that if, as here, it be established that the cause of delay could not have been forseen, then the excess service thereby caused is excused under the proviso.

The holding of the Circuit Court of Appeals for the Second Circuit in the case *United States v. New York Central etc. Ry. Co.*, (218 Fed. 611) indicates that it is not the view of that court to require that crews be relieved to pre-

vent excess service, as is evidenced by the syllabus, which correctly reflects the holding of the court, as follows:

> "Where a hot box constituted a sufficient excuse for delay of a train compelling employees to work beyond the service prescribed by the Hours of Service Law the delaying of the train necessitated by waiting for other trains to pass, necessarily resulting from the hot box, should be computed in figuring the time of excused delay."

Also in the case of *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (620), this court, in referring to telegraph operators, said:

> "Nor does the contention gather strength from the broad scope of the proviso in section 3, for if the latter, *in limiting the effect of the entire act* (our italics), could be said to include everything that may be embraced within the term emergency as used in section 2, this would be merely a duplication and would not invalidate the act."

In the case of *Missouri K. & T. Ry. Co. v. United States*, 231 U. S. 112, it was urged that in one of the consolidated cases the delay was the result of a cause, a defective injector, that was not known to the carrier and could not have been foreseen when the employees left a terminal, and that, therefore, by the proviso in section 3 the act did not apply, and this court, in refusing to consider the question because it

was raised only by a request to direct a verdict for the defendant, said "the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known." In other words, the affirmative defense had not been established.

No such situation as that is here presented, for the opinion of the Circuit Court of Appeals finds in accordance with the stipulation not only that the broken axle was a casualty and an unavoidable accident but also that the delay thereby caused was the result of causes *which were not known * * * at the time said employees left said terminal of Parker, and which could not have been foreseen.*

The only construction of the proviso which the Interstate Commerce Commission ever reported to Congress was that *"employees unavoidably delayed by reason of causes that could not, at the commencement of the trip have been foreseen, may lawfully continue on duty to the terminal or end of that run."*

The fact that Congress, by refraining from amending the act in any way thereafter, approved and adopted such construction, amply justifies the application of the rule announced by this court by Heath v. Wallace, 138 U. S. 573, that:

> *"The construction of a statute by those charged with the execution of it is always*

entitled to the most respectful consideration and ought not to be overruled without potent reason."

This rule is supported by the cases following:

Penoyer v. McConnoughy, 140 U. S. 1 (25);

United States v. Moore, 95 U. S. 760;

Brown v. United States, 113 U. S. 568 (574);

Edwards v. Darby, 12 Wheat. 206;

United States v. Ala. R. R. Co., 142 U. S. 616;

United States v. Corecedo, 209 U. S. 377.

ANOTHER VIEW:

Congress postponed the effective date of the act for one year to afford carriers the opportunity to make the arrangements and readjustments necessary to enable them to comply with its terms.

It charged the Interstate Commerce Commission with the duty of enforcing the act, which duty carried with it the further duty of interpreting the act.

The Interstate Commerce Commission did interpret the act and repeatedly published such interpretations for the guidance of carriers and reported to Congress its interpretation that employees delayed under the circumstances set forth in the proviso might *"continue on duty to*

the terminal or end of that run. The proviso quoted removes the application of the law to that trip." That interpretation would permit the petitioner to do lawfully that which it did in this case.

Congress, by inaction, concurred in the interpretation so communicated to it by the Commission.

Notwithstanding all this, the Interstate Commerce Commission instituted this suit, and in so doing it took a position contrary to the only interpretation which it had communicated to Congress and persuaded the Circuit Court of Appeals to decide (in the face of proof that the broken axle was a casualty and an unavoidable accident and that the delay to the train caused thereby was the result of causes which were not known to and which could not have been foreseen by the petitioner at the time its employees left said terminal of Parker) that under the proviso your petitioner was "only justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence, have relieved it."

This course of conduct by the Commission was without previous notice to carriers subject to the act and without any modification or rescission of its last administrative ruling No. 88 of June 25, 1908. And its effect was to place carriers subject to the act at a disadvantage in that it

set at naught all of the arrangements and readjustments which had been made by the carriers during the period of one year between the enactment and the effective date of the act.

The contention of the Commission that, even in those cases which fall within the meaning of the proviso, carriers are only justified in continuing their employees in service up to the time when they can with the exercise of proper diligence relieve them, violates not only the words but also the spirit of the proviso, and the effect is to interpolate into the proviso expressions and requirements not placed there by Congress.

It is true that section 2 of the act requires that employees who have been on duty for sixteen consecutive hours shall be relieved, but it is expressly stated by the proviso in section 3 that neither this duty nor any of the other provisions of the act shall apply "in any case of casualty," and it having been admitted in the instant case and the court having found that the broken axle constituted a casualty within the purview of the proviso, the Circuit Court of Appeals was not justified in holding that the duty to relieve remained after the happening of that which rendered the act no longer applicable.

If, as the proviso clearly states, the effect of the happening of a casualty or of an unavoidable accident or of a delay resulting from a cause which was not known to and which could not have been foreseen when the employee started upon his trip, is that "*the provisions of this act shall not apply*," then neither the re-

quirement for relief at the expiration of sixteen hours, nor any other requirement of the act, was longer applicable until the completion of the journey so delayed by reason of one of the specifically enumerated causes.

CONCLUSION.

Your petitioner respectfully submits, therefore, that this is a case in which this Honorable Court should order the issuance of the writ of *certiorari* hereby sought because of the errors specified in the petition; and also because the questions of law herein involved have not been passed upon by this Honorable Court and are of such gravity and importance that the public interests, and especially the interest of all carriers subject to such act, and the furtherance of justice, all require an authoritative decision by this Honorable Court upon such questions of law.

Whereas, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the United States Circuit Court of Appeals for the Ninth Circuit to bring this case up to this Honorable Court for such proceeding therein as this Honorable Court may deem just.

ROBERT DUNLAP,
E. W. CAMP,
PAUL BURKS,
Attorneys for Petitioner.

VERIFICATION.

United States of America, State of California, Southern District of California, Southern Division—ss.

A. G. Wells, being first duly sworn, says that he is an officer, to-wit, the General Manager of The Atchison, Topeka & Santa Fe Railway Company, petitioner in the above-entitled action, and as such makes this affidavit for and on behalf of said petitioner; that he has read the foregoing petition and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true; that his knowledge is derived from the record in said cause and from the statements of counsel for petitioner duly communicated to him.

A. G. WELLS.

Subscribed and sworn to before me this 8th day of October, A. D. 1915.

(Seal) C. N. STEDMAN.

Notary Public in and for the County of Los Angeles, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion said petition is well founded and the case is one in which the prayer of the petition should be granted by this Honorable Court.

E. W. CAMP,
Counsel for Petitioner.

ACKNOWLEDGMENT OF SERVICE.

Due service upon the United States of America and receipt of three copies of the foregoing notice of motion, motion, and petition for writ of certiorari, is hereby admitted this 8th day of October, A. D. 1915.

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Attorneys for United States of America and Defendant in Error.

APPENDIX I.

OPINION IN SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY CASE.

The opinion in case of *San Pedro, Los Angeles and Salt Lake Railroad Company*, plaintiff in error, vs. *United States of America*, defendant in error, referred to as forming the basis of the opinion in the case of The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, vs. United States of America, defendant in error.

[TITLE OF COURT AND CAUSE. NO. 2412.]

"Ross, Circuit Judge:

"In the case numbered in the court below 243 it is strenuously insisted by counsel for the plaintiff in error that the court erred in directing the jury to return a verdict for the plaintiff upon counts 3, 4, 5, 6, 7 and 8 of the complaint in that case.

"The third count of that complaint alleges a violation of the act of congress in that the defendant company on October 3, 1912, on its line between Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor, Brown, to be and remain on duty as such, in connection with its train No. 1, drawn by locomotive No. 3434, engaged in interstate commerce, for a period in excess of sixteen consecutive hours; and its fourth and fifth counts are identical with the third, except that in the fourth Brakeman Edwards and in the fifth Brakeman Berringer are included.

"The evidence showed without conflict that train No. 1, which was a passenger train, arrived at Las Vegas, which was a terminal station, October 3, 1912, between the hours of 5 and 5:32 p. m. There the train crew was changed, the outgoing crew, consisting of Brown, Edwards and Berringer, leaving Las Vegas in charge of the train at 5:45 p. m. of that day and so remained in charge of its movement until it reached Los Angeles, the place of its destination, at 8 p. m. of the succeeding day; so that, including the preparatory period of 42 minutes, that crew remained in service 27 continuous hours. The schedule running time of that train between the points named was 13 hours and a half. The train left Las Vegas on schedule time, but subsequently a heavy land-slide occurred on the defendant company's line between its stations Otis and Crucero, due to heavy rains, which slide was of such character and magnitude as to stop traffic over the road and compel the detour of train No. 1 over the lines respectively of the Tonopah & Tidewater and the Santa Fe Companies—over that of the former from Crucero, the junction of the lines of the defendant company and the Tonopah & Tidewater Company, to Ludlow, the junction of the last named company and the Santa Fe Company, and over the latter from Ludlow to Daggett. The rails of the Tonopah Company being light, necessarily required slow running, especially in view of the condition of the ground, occasioned by the heavy rains, all of which resulted in many delays which were beyond the power of the defendant company

to prevent; and none of which could have been foreseen by the defendant company at the time the train left Las Vegas, nor could the necessity of such detour have been then foreseen. When the train reached Daggett the prescribed 16 hour period had expired—17 hours and 5 minutes having been expended in making that run. At Daggett the engine crew of train No. 1 was relieved, but not its conductor nor brakemen, thay having continued on to the destination of the train at Los Angeles. San Bernardino, situated between Daggett and Los Angeles, and 60 miles east of the latter city, is a passenger terminal, but not for through trains; two local passenger train crews lay over there every night, each having one brakeman only. From the evidence it cannot be doubted that the train crew of train No. 1 could have been relieved both at San Bernardino and at Daggett, and the real question in regard to that crew is whether the act of congress under consideration required the defendant company to do so.

"To such an enactment these observations of the Supreme Court in the case of United States v. Dickson, 15 Pet. 141, 163, are very pertinent:

" 'The general rule of law which has prevailed, and become consecrated almost as a maxim in the interpretation of statutes, (is) that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set

up any such exception, must establish it as being within the words as well as within the reasons thereof.'

"To hold that the act under consideration is made inapplicable by any and every delay that is the result of a cause not known to the carrier, or its officer or agent in charge of such employee, at the time the latter leaves a terminal, and which could not have been foreseen, would be nothing short of making it a dead letter. Manifestly the whole act must be taken together and be so construed as to give effect to its humane purpose, and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent. There can be no doubt that the paramount purpose of the act was to prevent the overworking of the employees, to the end that their efficiency be not impaired, and that the obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse, secured to them by the provisos and exceptions contained in the act, which was not made effective within the usual time but its going into effect postponed for one year—the purpose being, as said by the Supreme Court in the case of Northern Pacific Railway Company v. Washington, 222 U. S. 370, 379, 'to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act.' It would seem to follow necessarily that in order for the carrier to justify the excess of service beyond the fixed period prescribed by the act, it must show that

the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that was the result of a cause not known to the carrier or its officer or agent in charge of such employee, at the time the latter left a terminal, and which could not have been foreseen.

"In the very recent case of Great Northern Railway Co. v. United States, decided October 28, 1914, by the Circuit Court of Appeal of the Eighth Circuit, that court expressly held, among other things, that the proviso in Sec. 3 of the act under consideration

" 'Does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them over time, and proper diligence requires train officials to know whether or not engines and cars are in proper condition for use when starting them upon a run.'

"In the preceding case of United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 833, the same court having under consideration the Act of March 4, 1907, said:

" 'By the terms of the proviso the carrier is excused "where the delay is the result of a cause not known * * * at the time said employee left a terminal, and which could not have been foreseen." Not merely which was not foreseen, but which *could not have been* foreseen. The phrase "by the exercise of due diligence and foresight" is not present. Counsel argue that by leaving out this phrase congress intended to limit the liability of the carrier,

that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We cannot assent to this interpretation. Clearly congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad. Conformably to this view it has been uniformly held by the courts that, ordinarily, delays in starting trains by reason of the fact that another train is late; from sidetracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso. The carrier must go still farther and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded.'

"Such was the view of this court in the case of United States v. Northern Pacific Railway Co., 215 Fed. 64, where the accident under consideration was the sole cause

why the crew there in question was engaged on its run for more than sixteen hours without a rest of eight consecutive hours.

"In the somewhat analogous case of Newport News & M. Val. Co. v. United States, 61 Fed. 488, 490, involving the act of congress forbidding interstate carriers of animals from confining them for more than 28 consecutive hours without unloading them for rest, water, and food, unless prevented 'by storm or other accidental causes,' the Circuit Court of Appeal of the Sixth Circuit, speaking through Judge Lurton, said:

" 'Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carirer must show, not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes."

" 'If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words, "other accidental causes," must be ascertained by referring to the preceding special words. The rule *"noscitur a sociis"* is clearly applicable. A storm is unavoidable, in the sense that it cannot be prevented. "Other accidental causes" must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence. What is an inevitable or unavoidable accident has been very thoroughly considered by this court in the case of Weeks v. Transit Co., 61 Fed. 120. It was there said that an inevitable accident—

" 'Was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law required of every one under the circumstances of the particular case.'

" 'Again, we said:

" 'An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise.'

" 'These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case, and those cited therein. If the accident was one which might have been

avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence.'

"As under the evidence there can be no doubt that the land-slide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4 and 5 must have been based on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was by the statute, properly construed, required to avail itself of it; in which view we think, for the reasons already stated, the court was right—being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act 'it was the intention of congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident, until the end of the *run*.'

"In support of that contention counsel earnestly rely upon Ruling 88 of the Interstate Commerce Commission made May 25 (*June*), 1908, which after quoting the first proviso of Sec. 3 of the act, reads:

"'Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip.'

"That ruling must be read and considered in connection with the preceding ruling of the Commission made March 16, 1908, which reads as follows:

"'287 (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point.'; and must also be read and considered in connection with the action of the Commission shown by the record in this case, that the suit was directed to be brought by the Attorney General at the request of the Interstate Commerce Commission.

"But over and above that, it is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of Congress.

"What has been above said in respect to counts 3, 4 and 5 of the complaint in case No. 243, in the court below equally governs the proper disposition of counts 6, 7 and 8 of the same complaint.

"The result is that the judgment of the court below in * * * respect to case No. 243 of that court, its judgment must be and is affirmed.

"(Endorsed:) Opinion. Filed Feb. 1, 1915."

APPENDIX II.

The opinion of United States District Judge Sawtelle in the case of United States of America vs. The Atchison, Topeka and Santa Fe Railway Company, 212 Fed. 1000, hereinbefore referred to.

"This is an action brought by the United States against the Atchison, Topeka & Santa Fe Railway Company, under the provisions of the act of Congress of March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321)), entitled 'An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.'

"Section 2 of said act is as follows:

" 'That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.'

"Section 3 provided 'that any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be or remain on duty' in violation of said second section above quoted, 'shall be liable to a penalty of not to exceed five hundred dollars for each and every violation.'

"The first three counts of the government's complaint to the conductor and two

brakemen in charge of defendant's train No. 18, on October 4 and 5, 1912.

"No. 18 was a mail, passenger and express train running between Los Angeles, Cal., and Phoenix, Ariz., and in the course of its run passed through San Bernardino, Barstow and Parker. Los Angeles was the initial terminal or starting point for this train, for its engine crew and also for its train crew, that is, its conductor and brakemen. The final destination of the engine crew was Barstow, of the train crew was Parker, and of the train itself was Phoenix. The scheduled running time of this train between Los Angeles and Parker was as follows:

Leave Los Angeles	2:00 p. m.
Arrive Barstow	7:15 p. m.
Leave Barstow	7:40 p. m.
Arrive Parker	1:15 a. m.

"Under the rules of the company the train crew were required to go on duty at Los Angeles at 1:30 p. m., so that under ordinary conditions these employes, on their regular run, would be on duty 11 hours and 45 minutes. On the particular days in question the movement of this train was as follows:

Train crew reported for duty	1:30 p. m.
Left Los Angeles	2:00 p. m.
Arrived Summit	6:20 p. m.
Left Summit	11:55 p. m.
Arrived Barstow	2:10 a. m.
Left Barstow	2:20 a. m.
Arrived (off duty) Parker	8:47 a. m.

"The train crew, therefore, was kept in continuous service for a period of 19 hours and 17 minutes.

"The defendant, in its answer, admitted the excess service of the train crew, but set

up an affirmative defense, to-wit, that all of the excess service was due to the detainment of train No. 18 at Summit by reason of a casualty or unavoidable accident unknown to the carrier, and which could not have been foreseen at the time No. 18 left 'said terminal at Los Angeles.' The answer (as amended) also alleged that train No. 18 did not leave 'a terminal' of the defendant after the casualty had happened, or after it was known to the defendant. The defendant, therefore, attempted to bring itself within the proviso of section 3 of the Hours of Service Act, which reads as follows:

"'The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal and which could not have been foreseen.'

"The particular fact pleaded, and shown in evidence to be the casualty or unavoidable accident directly responsible for the excess service, was the derailment of a freight car in a west-bound freight train between Barstow and Los Angeles, known as 'Extra West 954.' It is not necessary here to refer particularly to the movement of Extra 954, nor to the inspection to which it was subjected before it left Barstow, for the reason that the government does not contend that it was not properly inspected, but, for the purposes of this case, admits that the breaking in two of this extra near Summit and the consequent derailment of a car and the blocking of the main line at that point was clearly unavoidable and unknown and unforeseen to the carrier at the time train No.

18 left both Los Angeles and San Bernardino. At the time the train left Summit it was known to the officials of the company in charge of this train that the conductor and brakeman, if to continue on their regular run to Parker, would be on duty over 16 consecutive hours. The evidence shows that Barstow was a terminal of the defendant for freight trains and freight crews, and also it was the terminal for one or more passenger crews running between Barstow and Bakersfield, but was not the terminal for passenger crews running between Los Angeles and Parker.

"It is contended by the government that the court should direct a verdict in its favor for the following reasons: Barstow was a 'terminal,' within the meaning of that term in the proviso, and therefore any delays known to the officials of the company before train No. 18 left Barstow could not be accepted as an excuse, and that, even if Barstow was not a 'terminal,' as that term is used in the proviso, still train No. 18 was allowed to leave there, knowing that the conductor and brakemen would be in continuous service over 16 hours when a relief crew (although the evidence shows that at that time there was no passenger crew that could have been used as a relief crew on train No. 18) could have been put on this train at Barstow and relieved the old crew at any time within, or at the expiration of, the 16 hours.

"(1) The complaint alleging, and the defendant in its answer admitting, that the defendant had required or permitted its said employes on said train No. 18 above named to remain on duty for a longer period than 16 consecutive hours, this made a *prima*

facie case. United States v. Kansas City Southern Ry. Co. (C. C. A. 8th Cir.), 202 Fed. 828, 121 C. C. A. 136; C. B. & Q. R. R. Co. v. United States, 195 Fed. 241, 115 C. C. A. 193.

"There appears to be three separate provisions in section 2 of said act, the violation of which subjects the carrier to a penalty: (1) That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty for a longer period than 16 consecutive hours; (2) and whenever any such employe of such common carrier shall have been on duty for 16 hours, be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; (3) and no such employe who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty.

"Section 3 of said act sets forth the penalty for violation thereof, and then provides that the *provisions* (meaning all of the provisions of the act, including the one in section 2 above quoted, fixing a penalty for violation thereof) *shall not apply*

" 'in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen: Porvided further, that the provisions of this act shall not apply to the crews of wrecking or relief trains.'

"(2) It is contended by the government that it was unlawful for the defendant company to have caused its employes to work or remain on duty after the 16-hour limit, longer than was necessary to reach the first proper stopping place where its crew could have been replaced, and there it should have been tied up, and that it was its

" 'duty to have suitable stopping places where rest can be had for its employes, or proper places along its route proportionate to the exigencies of the business.'

"It has been said that this act is remedial in its nature, and should 'receive such consideration as will give its general purpose reasonable effect.' To this we are agreed; but at the same time we cannot lend ourselves to a construction which would violate the plain letter of the act and entirely destroy the proviso therein contained. Had Congress not intended that the carriers should be relieved in cases of casualty, unavoidable accident, or the act of God, it would not have inserted the proviso in the act. It is a well known fact that this legislation was before Congress for many months, and that much testimony was taken by the several committees of that body before the final draft of the act was completed; and we must assume that Congress intended that the carriers should be excused from the penalties of the act, and that the act should not apply whenever the delay was caused by casualty, unavoidable accident, or act of God.

"The plain wording of the proviso involved is:

" 'The provisions of this act *shall not apply* in any case of casualty or unavoidable accident or act of God; nor where the delay

was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen.'

"How, then, can this court assess a penalty in a case like the one at bar, where it is plainly shown that the crew were kept on duty by reason of casualty or unavoidable accident, in face of the statute, which for such causes excuses defendant? In cases of this nature, to adopt the construction contended for by the government would be equivalent to nullifying the proviso contained in the act, and would require of the defendant the performance of a duty not only not required, but expressly excused by the act itself. Had Congress intended that, in case of delay occasioned by 'casualty, unavoidable accident or act of God,' the train should only be allowed to go to the first suitable stopping place and there tie up, it would have inserted such a provision in the act—one similar to the provision contained in the amendment to the Safety Appliance Act, approved March 4, 1911 (Act March 4, 1911, c. 285, 36 Stat. 1397 (U. S. Comp. St. Supp. 1911, p. 1338)). Section 4 of this act (Act April 14, 1910, c. 160, 36 Stat. 288 (U. S. Comp. St. Supp. 1911, p. 1329)) contains a proviso as follows:

" 'That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the *nearest*

available point where such car can be repaired, without liability for the penalties imposed by section four of this act,' etc.

"In this connection, it might be well to refer to the administrative rulings of the Interstate Commerce Commission, as contained in its Twenty-second Annual Report, dated December 24, 1908. In referring to the act in question, the Commission said:

" 'Questions immediately arose as to its proper interpretation. With a view to explaining in so far as possible those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings: * * * Section 3. * * * Employes unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or *end of that run*.'

"Thus it appears that the Commission to which was intrusted the execution of this law, and whose duty it was to ascertain whether or not its provisions were being observed, not only ruled that, 'Employes unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run' synonoymously. In other words they not only defined the word 'terminal' to mean the equivalent of the end of that run, but actually held that employes unavoidably detained by reason of causes that could not, at the commencement of the trip, have been foreseen may 'lawfully continue on duty to the terminal or end of that run.' See Conference Rulings of the Commission issued April 1, 1911, page 24, Rule 287, which is as follows:

" 'Any employe so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip.'

"See, also, pamphlet issued by the Interstate Commerce Commission, containing 'The Hours of Service Law and the administrative rulings and opinions therein printed by order of the Commission March 25, 1912,' which contains this same rule 287.

"The Commission did not then believe that it was the duty of the carrier to stop the train at the first suitable stopping place and there tie up until the men could be relieved, as is contended was the duty of the railroad company in this case.

"These administrative rulings were promulgated by the Commission because, as was stated by them, questions immediately arose as to the proper interpretation of the act, and with a view to explaining, in so far as was possible, those features which might be claimed to be ambiguous, the Commission adopted the rulings above quoted; and it is reasonable to suppose that such administrative rulings were intended for the guidance of the carrier and trainmen and others having to do with the movement of trains. We heartily agree with the Commission that the terms of the act 'are susceptible of more than one interpretation.'

"That the 'construction of a statute by those changes with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without potent reasons,' was the rule announced at a very early day by the Supreme Court of the United States and reiterated in a very large number of cases. Heath v.

Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063, and cases cited.

"We cannot adopt the interpretation contended for by the government in this case, namely, that, if the train was delayed by reason of any of the causes set forth in the proviso in section 3 of the act, the train crew may not lawfully continue on duty to the terminal or end of that run. This court holds that in such a case there is nothing in the act which requires the carrier to proceed to the next suitable stopping place and there tie up and relieve the crew, or which prevents the crew from continuing on duty and proceeding on their trip to the terminal or end of that run, which in this case was at Parker, even though at the time they left Summit, the place where the train was delayed and remained on account of the unavoidable accident or casualty which occasioned the delay, they had no reasonable expectation of being able to reach the end of their run, Parker, within the 16-hour limit. In the opinion of this court, such a construction is not authorized.

"The manifest purpose and effect of this statute is to prohibit railroad companies from requiring or permitting their employes to be or remain on duty for a longer period than 16 consecutive hours, except in case of casualty, unavoidable accident or act of God, or where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of such employe at the time such employe left a terminal, and which could not have been foreseen, and in case of casualty, unavoidable accident or the act of God, or where the delay was the result of a cause not known to the carrier, or its officers or agent in charge of

such employe at the time such employe left a terminal, and which could not have been foreseen, preventing the train crew from completing its run or reaching its destination within 16 hours from the time of going on duty for the run, to take the case out of the operation of the statute, and to permit the crew in charge of any train delayed by such casualty or unavoidable accident or act of God, or other cause not known to or which could not have been foreseen by the officers or agent of the carrier in charge of such crew at the time the crew left a terminal, to continue on duty to the end of the run, *except* where the officers or agent of the railroad in charge of such crew or employes knew of the existence of, or could have foreseen, such casualty, accident or act of God, or other cause of delay, before such train crew started upon its run upon which the delay occurred. *If* the officers or agent of the carrier in charge of such train crew knew of the existence of, or could have foreseen, the casualty, accident, or act of God, or other cause of delay, before such train crew started on its run, the statute would apply, regardless of the delay caused thereby, and the railroad company requiring or permitting such crew to continue on duty after 16 hours would, in such case, be liable to the penalty provided by the statute. In all other cases of casualty, unavoidable accident, or act of God, or other cause of delay, the statute would not apply. In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employe *knew*, or could have foreseen, the existence of the cause of

the delay at the time such employe left the terminal or starting point.

"The government also contends that the railroad company violated the provisions of said act by requiring or permitting the said train crew to remain on duty after leaving Barstow, upon the theory that Barstow, although not shown to be a terminal for train No. 18, or for the crew on said train, was nevertheless a terminal, and that said act makes it unlawful for a carrier to require or permit any employe to remain on duty in violation of section 2 of said act, because the proviso in said act contained does not excuse the defendant 'where the delay was the result of a cause not known to the carrier, or its officers or agent in charge of such employe at the time such employe left a terminal'; in other words, that the officials of the defendant company knew of the unavoidable accident or casualty which was the cause of the delay to train No. 18 at the time said employes left Barstow, a terminal.

"It does not appear that the word 'terminal' has been judicially defined. According to the usage of railroad men in the United States, as shown by the evidence in this case, each train crew it assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the 'terminals' of that run within the meaning of the word 'terminal' as used in the proviso in section 3 of this act. In the usage of railroad men there are different 'runs' for different train crews, and also different runs for different employes on the same train, and the run of an engineer on

a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminus, and one run or several runs for freight crews may lie between the terminal of the run of a single passenger crew, and each of these runs has its own terminals. And in applying this act to a given case, regard must be had to the line of service in which the train crew or employes in question were engaged at the time of the alleged violation of the act, and that alone.

"It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakeman, and that the defendant did not violate said act by requiring or permitting the employes mentioned in the complaint to be or remain on duty for a longer period than 16 consecutive hours and in requiring said train crew to continue on duty to the terminal or end of that run.

(NOTE: That part of opinion relating to counts other than the first three omitted for sake of brevity.)

"As a result of these views the jury are instructed to return a verdict for the defendant on the first three counts of the complaint, and for the plaintiff on the remaining counts."

Exhibit "A."

NOV 18 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 267

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,
Petitioner and Plaintiff in Error.
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

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STATEMENT OF THE CASE.

NOTE. Transcript references are to pages of printed transcript of record which accompanied petition for writ of certiorari and which, by stipulation, constitutes the return to such writ.

Nature of Action.

The Atchison, Topeka & Santa Fe Railway Company, as petitioner, seeks to have reviewed and reversed a judgment (Tr., 64, 220 Fed., 748) of the United States Circuit Court of Appeals for the Ninth Circuit (hereinafter referred to as the Appellate

Court) which affirmed a judgment (Tr., 14) for penalties aggregating three hundred dollars rendered by the United States District Court for the Southern District of California, Southern Division (hereinafter referred to as the trial court) in favor of respondent in an action brought against petitioner for the recovery of penalties for three alleged violations of the Federal Statute known as "The Hours of Service Act."

The question involved is whether a trainman may be lawfully continued on duty upon his train in excess of sixteen hours and until his train reaches the terminal fixed for his usual run which would generally be easily reached within the limit, but in the particular case is prevented by something unforeseen and not preventable occurring after he starts on his run. Do the inhibitions of the statute apply to such a case?

Statute Involved.

The statute upon which the government's action was based is the Act of Congress entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon," approved March 4, 1907 (34 St. L. 1415), and which became effective March 4, 1908, or "one year after its passage."

In so far as it is applicable to this case said Act provides:

> "Sec. 2. That it shall be unlawful for any common carrier * * * to require or permit any employee * * * to be or remain on duty for a longer period than sixteen consecutive hours and whenever any such employee * * * shall have been continuously on duty for sixteen hours he shall be relieved * * * until he has had at least ten consecutive hours off duty. * * *
>
> Sec. 3. That any such common carrier * * * requiring or permitting any employee to go, be, or r

main on duty in violation of the second section hereof, shall be liable to a penalty * * * *Provided, that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.* * *

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act."

Interstate Commerce Commission's Interpretation of Act.

Shortly after said Act became effective, the Interstate Commerce Commission promulgated, under date of March 16, 1908, its Administrative Ruling No. 287 (Tr., 29) giving its interpretation and construction of the various provisions of said Act wherein, with reference to the above-quoted proviso found in Section 3, it was stated:

"(i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains until such employees, so delayed, reach a terminal or relay point. (See Rule 88.)

'Casualty,' like its synonyms 'accident' and 'misfortune,' may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, Vol. 2, 1003.)"

Thereafter, under date of June 25, 1908, said Commission on more mature consideration promulgated its further administrative ruling No. 88 (Tr., 30) which, though subsequently dated bears a lower serial number

than does the earlier ruling, wherein it quotes the above-quoted proviso found in Sec. 3 of the Act, and, for the guidance of carriers subject to said Act, interprets the meaning of said proviso in the language following:

> *"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."*

Thereafter the Commission, in its twenty-second annual report to the Congress of the United States, dated December 24, 1908, quoted its Administrative Ruling No. 88 of June 25, 1908, as setting forth the proviso found in Sec. 3 of the Act (Tr., 32, I. C. C.'s 22d Annual Report to Congress, 1908, page 50), (but no reference to or mention of the earlier Administrative Ruling No. 287, of March 16, 1908, appears in said report), wherein, as in subsequent annual reports

> "It is respectfully suggested that the law * * * be made specific, so as to restrict the exercise on the part of carriers of discretion in determining whether or not a given incident is a 'casualty' or 'unavoidable accident' within the meaning of the act; or that some one should be designated and empowered to decide all such questions * * * It is therefore desirable that Congress should, by a few lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise. * * *"

Neither by any subsequent report to Congress nor by any subsequent Administrative Ruling or otherwise (save by such inference as may be drawn from the prosecution of suits of the nature here involved) has said Commission ever modified or repudiated its Administrative Ruling of June 25, 1908.

In numerous reports to Congress since 1908 said Commission reiterated the recommendations embraced in the report last referred to but Congress has never seen fit to "clarify the situation" or to express any disapproval

of the construction of said proviso so communicated to it by said Commission nor has Congress ever seen fit to amend said Act except in one particular which was accomplished by the Act of Congress of May 4, 1916 (S. 3769—Pub. 68, Title LVI. A Chapter F, Section 8679, U. S. Comp., Stat. Amendments 1916) which, after providing that a carrier permitting any "violation of the second section hereof shall be liable to a penalty of *not less than* $100 *nor more than* $500 *for each and every violation,*" re-enacts the proviso without change in the wording hereinbefore quoted.

Allegations of Complaint.

With such legislation and construction in effect, respondent, on March 7, 1913, filed in the trial court its complaint (Tr., 6) alleging that its action was brought upon the suggestion of the Attorney General of the United States at the request of and upon information furnished by the Interstate Commerce Commission and charging, in three separate counts, that petitioner, a Kansas corporation, having an office and transacting business in California as a common carrier engaged in interstate commerce by railroad and subject to said Hours of Service Act, violated such Act by requiring and permitting a conductor and two brakemen, constituting the "train crew" of petitioner's interstate passenger train No. 17, to be and remain continuously on duty between Parker, Arizona, and Los Angeles, California, for a longer period than sixteen consecutive hours from 10:40 P. M., October 2, 1912, until 8:25 P. M., October 3, 1912.

Nature of Defense.

By its answer (Tr., 10) petitioner admitted its corporate capacity, the interstate character of its business,

the excess service as charged and that it and said employees were subject to said Hours of Service Act, but pleaded, as an affirmative defense, that such service was not in violation of such Act because of the above-quoted proviso in Section 3 thereof and of the facts specifically pleaded by way of justification and excuse as follows:

"That said station of Parker is a terminal of this defendant and the terminal from which said employees were engaged by this defendant to operate and accompany said train to the City of Los Angeles, in the State of California, which is the terminal to which said employees were destined at the time stated in the complaint; that the schedule and usual time of said train in going from said Parker to said Los Angeles is and was at the times mentioned in said complaint much less than 16 hours, to wit, 11 hours and 5 minutes, and that said train would at the time mentioned in said complaint, have made said run in about 11 hours and 5 minutes, and in much less than 16 hours, but for certain casualties and unavoidable accidents, and for certain causes which could not have been foreseen by and were not known to said defendant, or any of its officers or agents, at the time when said crew left said terminal at Parker; that is to say, said train was delayed at certain stations between Cadiz and Barstow by reason of congestion of trains due to certain washouts caused by storm waters shortly before the passage of said train, which washouts had delayed a number of passenger trains on the main line of this defendant, congesting all traffic in said line and causing necessary delay to all trains; but that said delays, aggregating 2 hours and 30 minutes before reaching the station of Barstow would not have caused said crew to exceed the time of 16 hours in reaching said station of Los Angeles.

Said train left Barstow at 7:45 A. M., October 3d, and shortly thereafter, at 8:30 A. M., an axle broke under the tank of the engine of said train, whereby said train was delayed 6 hours and 10 minutes, although every effort was made to remedy the accident and proceed at the earliest possible moment; that the breaking of the axle was a casualty and

unavoidable accident, and was the result of causes which were not known to this defendant, or any of its officers or agents, when said engine left its terminal, to wit, said station of Barstow, and that said casualty could not have been foreseen when said engine left said Barstow."

Facts Surrounding Alleged Violations.

The issues thus tendered were submitted to the trial court upon a "Stipulation as to Facts" (Tr., 17) which, in addition to facts already stated, set forth:

1. That petitioner's business of the character hereinbefore stated was, customarily and at the times laid in the complaint, well managed and operated in accordance with the best known custom and usage prevailing among well operated railways throughout this country. (Tr., 28.)

2. That petitioner's system of main line and branch railways, extending from Chicago to San Francisco and Los Angeles was, for purposes of practical and convenient operation, divided into certain "Grand Operating Divisions" which were in turn, divided into convenient 'divisions." Embraced in Coast Lines Grand Operating Division were that part of the main transcontinental line extending westerly from Albuquerque, New Mexico, through Ash Fork, Needles, Cadiz, Barstow and San Bernardino to Los Angeles, California, and certain branches, including California and Arizona branch, which extended from Cadiz, California (100 miles east of Barstow), in a southeasterly direction a distance of 84.6 miles, to Parker, Arizona, beyond which point it extended to Phoenix, Arizona, and (in common with other lines south of Ash Fork and east of Parker) formed a part of another Grand Operating Division called S. F. P. & P. Lines.

3. That petitioner ran daily over its said lines between Phoenix and Los Angeles certain interstate trains called "Phoenix Express" which, customarily and at the times laid in the complaint, transported United States mail (in a railway mail car constituting a part of their regular equipment) and interstate express, passengers and baggage. When running eastbound from Los Angeles to Phoenix these daily trains were designated as "No. 18" and when running westbound between Phoenix and Los Angeles they were designated as "No. 17." These trains were handled by employees of S. F. P. & P. Lines between Phoenix and Parker, where train and engine crews were changed and from where "No. 17" was turned over to and handled to Los Angeles, a distance of 335.3 miles, by the "Coast Lines" passenger train crew (consisting of one conductor and two brakemen) which had handled "No. 18" of the preceding day from Los Angeles to Parker. The handling of the trains east of Parker and the runs of engine crews west of that point are matters of no concern in this case which involves only the train crew.

4. That it is commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains that the word "terminal" has reference to certain train or trains or certain crew or crews, and means the beginning or the end of the employees run or the point at which in the regular course of business he would go on duty as a member of a particular crew, or at which in the regular course of business he would cease to be a member of such crew of a particular train and be relieved from duty. In other words, the point at which he becomes a member of a train crew in charge of a particular train and the point to which it was intended at the time when he became a member of such crew of such train that he

should accompany such train as a member of such crew; and that it is not generally understood among railroad men that the word "terminal" as applied to any particular train or the crew thereof refers to relay or division point between the point at which an employee became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the train, or the terminal for other crews and other trains. (Tr., 26.)

5. That Los Angeles and Parker were the "terminals" for the Coast Lines passenger train crews engaged in operating trains No. 18 and No. 17. "The home terminal" of such crews was Los Angeles where the members resided and had their homes, while their "away-from-home terminal" was Parker where they had provided themselves with accommodations for rest and food. One crew would go "on duty" at Los Angeles at 1:30 P. M. and handle No. 18 to Parker where, after being on duty for 11 hours and 45 minutes, its members would be released from duty and would neither perform nor be held responsible for the performance of any service even should occasion therefor arise during their "lay over" period of 21 hours 25 minutes from 1:15 A. M. until 10:40 P. M. when they would again go "on duty" and handle No. 18 from Parker to Los Angeles where, after being on duty for 11 hours 35 minutes including 30 minutes preparatory time, they would again be released from all duty and remain at home for 27 hours 15 minutes from 10:15 A. M. until 1:30 P. M. on the following day, thereby making one round trip every three days.

6. That the chief dispatcher of "Arizona Division"

of Coast Lines, located at Needles, directed all train movements east of Barstow, at which point No. 17 and other westbound trains came under the supervision of and were moved pursuant to "train orders" communicated by telephone or telegraph to operators at various stations in the customary and well understood manner by the chief dispatcher of "Los Angeles Division" located at San Bernardino—a station 81.1 miles west of Barstow and 70.7 miles east of Los Angeles—which was a terminal for other trains and crews but not for No. 17 nor the members of its crew.

7. That on October 2, 1912, the crew of No. 17 reported for duty at Parker at 10:40 P. M. and at 11:10 P. M. left with said train for Los Angeles, to which point the usual running time was 11 hours 5 minutes. The run over California and Arizona Branch from Parker to Cadiz (84.6 miles) was made on schedule time but after the train reached the main line its movement thereover between Cadiz and Barstow (96.8 miles) was delayed 2 hours 30 minutes on account of washouts and the causes of such delays were not known to petitioner or to any of its officers or agents in charge of the train crew at the time such employees left Parker and could not have been foreseen. (Tr., 23.) The result of the delays in reaching Barstow was that, instead of leaving that point at 4:45 A. M. on October 3d, according to its schedule, No. 17 left Barstow at 7:45 A. M. but with ample time still remaining for the crew, which had then been on duty only 9 hours 5 minutes, to complete the remaining 151.8 miles of their run to Los Angeles within less than 16 hours from the time they went on duty. The chapter of casualties, unavoidable accidents and unforeseeable causes of delay, however, was not yet completed, for while running between Barstow and San Bernardino, at a point on the main line between the stations

of Bryman and Oro Grande (respectively 26 miles and 31.3 miles west of Barstow) at 8:30 o'clock A. M. an axle broke under the tank of the engine which had been attached to the train at Barstow for the purpose of pulling it up to Summit and thence into San Bernardino. This occurrence between stations blocked the main line and the movement of No. 17 was thereby "necessarily and unavoidably delayed for a period of 6 hours 10 minutes" by what was admitted to have been *"a casualty and an unavoidable accident"*; and *"that the delay to said train caused thereby was the result of causes which were not known to defendant, or to any of its officers or agents in charge of said employees at the time said employees left said terminal of Parker, and which could not have been foreseen,"* was also expressly admitted. (Tr., 24.) While the crew was thus delayed its period of sixteen continuous hours on duty expired before the necessary repairs could be made and the main line cleared, with the result that, instead of reaching San Bernardino at 7:35 A. M. according to its usual schedule, or at 10:35 A. M. as it would have done but for said unforeseen delays in reaching and leaving Barstow, No. 17 left Oro Grande at 3:23 P. M. instead of at 5:28 A. M. and (after passing four other small stations where there were sidetracks sufficient for its accommodation and at which there were continuously operated telegraph offices which were at all times in touch with the chief dispatcher who was directing the movement of this train) actually reached San Bernardino at 5:30 P. M., from which point the members of said crew were permitted to complete their run to their homes in Los Angeles where they arrived at 8:25 P. M., October 3d, instead of at 10:55 A. M. according to their schedule, or at 1:16 P. M. as they would have done but for said delays in reaching and leaving Barstow, thereby remain-

ing on duty (including said 6 hours 10 minutes during which there was no actual release) for a period of 21 hours 35 minutes.

8. That it was necessary, after the axle under the tank of No. 17's tender broke to assemble and send from San Bernardino to the point of the accident, a distance of 52.3 miles, a "wrecking crew" which carried, as a part of the equipment necessary to open a main line for traffic, a portable telephone by means of which communication was established between San Bernardino and the point where the main line was blocked between stations. In this way it was known to defendant's officers and agents in charge of No. 17's crew, before the expiration of the delay of 6 hours 10 minutes caused by said broken axle and before the damage causing such delay had been repaired and before No. 17 left the point where such damage and delay occurred, that such employees would have been on duty in excess of 16 hours by the time they reached San Bernardino.

9. That San Bernardino was a point known and designated as a "division terminal" from and to which crews of freight trains and of certain other passenger trains customarily brought their trains, but said station was not a terminal for the passenger train crew in charge of trains No. 17 and No. 18 or of other trains operated between Parker and Los Angeles. At the time the crew of No. 17 had been continuously on duty for 16 hours defendant had in its employ at Los Angeles and also at San Bernardino passenger train crews which were customarily assigned to other passenger trains, and also crews subject to call which were customarily used in operating freight trains but qualified, should necessity require, to operate passenger trains between San Bernardino and Los Angeles.

10. That defendant could have relieved the crew of No. 17 at San Bernardino by placing said train in charge of one of such freight or passenger train crews at a time which would have permitted the crew of No. 17 to "deadhead" from San Bernardino to Los Angeles without performing or being held responsible for the performance of any service in connection with the movement of said train should occasion therefor arise.

11. That no effort was made by the officers and agents in charge of any employee constituting a member of the train crew of No. 17 to relieve him before he had been on duty in excess of sixteen hours, or at San Bernardino, or short of Los Angeles, because they knew that No. 17 had met with a casualty and an unavoidable accident and that the delay to said train was "the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and which could not have been foreseen" and because they believed that the delays so caused justified the retention of such employee in service until he should have completed his run by taking his train through to his home terminal at Los Angeles and because they considered it desirable; and in accordance with custom and usage prevailing upon all well operated railroads, both from the viewpoint of the employer and of the employee that they should be permitted at the earliest opportunity to reach their home terminal and rest at their respective homes before being required again to go on duty and because they believed that such action was authorized both by said Hours of Service Act and by said Administrative Ruling No. 88 of June 25, 1908.

Findings of Fact and Conclusions of Law.

The trial court, after finding that the facts were as hereinbefore set forth (Tr., 36), concluded that the act of the petitioner in requiring and permitting said crew to complete its run to Los Angeles, instead of relieving it at the expiration of sixteen hours or at San Bernardino, as a matter of law constituted a violation of said Hours of Service Act and a judgment for respondent for One Hundred Dollars on each of three counts was entered accordingly. (Tr., 14.)

Proceedings in Appellate Court.

Petitioner, by proper proceedings in error, thereafter caused the record, proceedings and judgment to be submitted to and reviewed by the Appellate Court upon the errors there assigned and urged. (Tr., 39.)

Contentions of Petitioner.

By five separate assignments of error, petitioner directed the attention of said Appellate Court to its contention that the judgment under review was contrary not only to the evidence but also to the express provisions of said Hours of Service Act for the reasons following:

1. Because the government had expressly stipulated (a) that the "terminals" of the employees involved were Parker and Los Angeles, and (b) that after leaving their "away-from-home terminal" at Parker and after they had started on their run and before they had reached their "home terminal" at Los Angeles or had completed their run, said employees had been delayed (for a period which exceeded their service in excess of sixteen hours) by a "casualty," an "unavoidable accident," and (c) that their delay was "the result of a cause not known * * * at the time said employee left a terminal and which could not have been foreseen. * * *"

2. Because service of employees thus delayed ceased to be controlled by said Hours of Service Act which, upon the happening of the contingencies stipulated, no longer applied to that trip.

3. Because the service in question was not contrary to or prohibited by and was, on the contrary, expressly authorized not only by the proviso found in Section 3 of said Hours of Service Act but also by Administrative Ruling No. 88 construing said proviso promulgated for the guidance of carriers by Interstate Commerce Commission June 25, 1908, and thereafter reported by said Commission to Congress which (by its failure to amend the Act) had acquiesced therein.

4. Because any other construction would render meaningless and nullify the plain wording of such proviso and would read into the Act requirements which Congress has not enacted.

Contentions of Government.

Respondent, in opposing petitioner's contentions, urged, that, notwithstanding the wording of said proviso found in Section 3 of the Act and of said Administrative Ruling No. 88.

First. That the words "a terminal" as used in said proviso do not mean *the terminal* from which an employee in question starts on his trip but rather *any terminal* through which such employee may pass during the course of his usual or customary run.

Second. That a delay to a train by reason of some unavoidable accident does not automatically extend to a carrier a license to permit its employees thereon to continue the operation thereof to the end of their usual or customary runs.

Third. That a failure to relieve an employee after

sixteen hours of continuous service is not justified by a showing that his train was delayed en route by one of the causes enumerated in the proviso of Section 3, but that the duty to relieve is continuing and mandatory even after the happening of one of the causes specifically enumerated in the proviso as determining the circumstances under which "the provisions of this Act shall not apply."

Fourth. That an excusable failure to prevent some excess service (as where a train is delayed by unavoidable accident or like cause under circumstances rendering the carriers unable to relieve employees thereon at the very instant their sixteen hours of service expires) does not justify the carrier in abandoning or license it to abandon "all efforts thereafter to provide relief for such employees"; and

Fifth. That "the delay," as used in the first proviso in Section 3 of said Act, has reference to the delay of the carrier in relieving employees after sixteen hours of continuous service as required by Section 2, does not refer to the delay suffered by a particular train or employee and that, even after the happening of a cause of delay specifically enumerated in the proviso, there, nevertheless, still devolves upon the carrier a continuing duty to provide relief at the earliest opportunity and thereby to minimize justifiable excess service.

View of Appellate Court.

The Appellate Court, by its opinion (220 Fed., 748), sustained the contentions of respondent upon the ground (as appears from its opinion in the Salt Lake Case, 220 Fed., 737, set out as Appendix I at pages 56 to 65 of Petition for Writ of Certiorari) that, although petitioner was entirely justified in continuing its train crew in service up to the time it could, with the exercise of

proper diligence, have relieved it, still said Act required petitioner to avail itself of the opportunity of relieving the crew at San Bernardino.

The Appellate Court thereafter denied an application for a rehearing of said cause properly and timely interposed by petitioner, and, its decision being reviewable only by certiorari, petitioner applied to this court for the writ which was issued herein. It having been stipulated that the record which accompanied the petition may be considered as a return to the writ of certiorari, the judgment so rendered and affirmed is now before this court for review pursuant to the provisions of Section 240 of the Judicial Code, upon the following:

Specification of Errors Relied Upon.

First. The judgment under review is contrary to and in direct violation of the plain terms and provisions of said Hours of Service Act for the reasons following:

1. The train described in the complaint and the designated employees constituting its crew were delayed by a casualty and an unavoidable accident the necessary effect of which was to keep the crew on duty in excess of sixteen hours and the happening of which *ipso facto* rendered said Act no longer applicable to the crew so delayed.

2. The delay to which said train and employees were subjected was the result of a cause not known to defendant or any officer or agent in charge of such employees at the time said employees left a terminal and which could not have been foreseen by reason whereof said Act ceased to apply to the service of employees so delayed or to prohibit their retention in service in excess of sixteen hours and there was, therefore, no statutory duty resting upon the employer to relieve them at the expiration of six-

teen hours or at any time before they had completed their run.

3. The Interstate Commerce Commission construed the proviso found in Section 3 of said Hours of Service Act as removing the application of said law to any trip upon which employees had been delayed by casualties or unavoidable accidents *or* by causes not known before employees left a terminal and which could not have been foreseen and as permitting employees so delayed to continue on duty to the terminal or end of that run and the Congress of the United States acquiesced in such construction so communicated to it by said Commission by failing to amend said proviso or to express any disapproval of such construction.

4. The Hours of Service Act expressly authorizes the retention in service in excess of sixteen hours of employees who are delayed in completing their runs by any of the causes specified in the proviso in Section 3 and it affirmatively appears from the record that the employees named in the complaint were prevented from completing their run within sixteen hours solely by reason of causes thus specified.

Second. The judgment under review is not only wholly unsupported by the evidence but it is directly contrary to the evidence and to the facts as stipulated by the parties and as found by the trial court for the reason that it affirmatively appears from the agreed statement of facts and from the findings of facts made by the trial court that the retention in service during the period named in the complaint of the employees designated as constituting the crew of train No. 17 was not in violation of said Hours of Service Act because:

(a) The delay to which train No. 17 and its crew were subjected was the result of a cause not known to peti-

tioner or to any officer or agent in charge of such employees at the time said employees left a terminal and which could not have been foreseen; and

(b) The retention of such employees in service in excess of sixteen hours was the result of a casualty and of an unavoidable accident; and

(c) The retention of such employees in service in excess of sixteen hours after they had been so delayed was expressly authorized by said Act; and

(d) The Hours of Service Act automatically ceased to apply to or to control the service of said employees after they had been delayed by causes and under circumstances stipulated to and found by the trial court and there was, therefore, no legal duty on the part of petitioner to relieve them before they had completed their run to Los Angeles.

Third. The trial court and the Appellate Court both erred in holding that said Act required petitioner to relieve the crew of train No. 17 at San Bernardino, in order to minimize its service in excess of 16 hours, notwithstanding the fact that both courts expressly found the stipulated fact that said train was delayed for 6 hours and 10 minutes (a period exceeding the service in excess of sixteen hours) before reaching San Bernardino by the broken axle which was admittedly a casualty and an unavoidable accident and a cause not known and which could not have been foreseen when said crew started upon its run, for the reason that the happening of any one of the contingencies enumerated in the proviso and found to have delayed the run in question suspended, in so far as concerned the crew so delayed, not only the affirmative duty of relieving at the expiration of sixteen hours, but the negative duty of preventing service in excess of that period prescribed by Section 2 of said Hours of Service Act.

Questions of Law Raised By Specifications.

Certain questions and propositions of law which involve the proper construction of the first proviso found in Section 3 of said Hours of Service Act, which are of gravity and importance in that they vitally affect not only all carriers subject to said Act but their employees as well and upon which this court has never had occasion to pass are presented by the foregoing "Specification of Errors Relied Upon."

Such questions and propositions, all of which were fully urged both in the trial court and in the Appellate Court, may be summarized as follows:

First. It is respectfully submitted that there is clear error in the decision in this case as follows:

(a) It nullifies and deprives of its obvious meaning and defeats the clear purpose of that part of said Hours of Service Act reading:

> "Provided, that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. * * *"

(b) It imposes upon carriers subject to said Hours of Service Act requirements in addition to those imposed by said Act itself and subjects such carriers to the penalties of the Act in those cases and under those circumstances where by its express terms "*the provisions of this Act shall not apply.*"

(c) It imposes upon such carriers, arbitrarily and without legislative sanction, the duty of relieving from service employees who are delayed by causes and under circumstances which, by the clear terms of said Act, toll

the operation thereof and render its provisions no longer applicable.

(d) It makes an act which, by the expressed will of Congress, was clearly not an offense *when* it was performed, an offense *after* its performance.

(e) It substitutes the construction of the court for the practical contemporaneous construction put upon the Act by the administrative body expressly empowered *"to execute and enforce its provisions,"* and, also, nullifies, sets aside and holds for naught, without clear or cogent reasons, the Interstate Commerce Commission's administrative ruling No. 88 of July 25, 1908, which was promulgated as a rule for the guidance of carriers subject to said Act and which was reported to Congress, as such, by the Commission.

(f) The decision in this case and in the Salt Lake Case are at variance with the decision of the same court in the case of *United States* v. *Northern Pacific Railway Company,* 215 Fed., 64-67, because in the case last mentioned, the court, after having found that the delay was the result of a casualty and a cause which could not have been foreseen, refused to hold that there was imposed upon the employer the duty to relieve the employees thus delayed.

Second. That the trial court and the Appellate Court both erred in holding that petitioner violated said Hours of Service Act by requiring and permitting its employees to remain on duty until the completion of their journey to their *home terminal* at Los Angeles, in view of the plain terms of the proviso of said Act hereinbefore quoted, and in view of the Interstate Commerce Commission's unrescinded and unmodified Administrative Ruling No. 88 of June 25, 1908, positively declaring that any

employee delayed by the causes or under the circumstances mentioned in such proviso:

> "* * * may, therefore, continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip,"

and more especially in view of the government's express admission:

> "That the breaking of said axle whereby said train was delayed for a period of 6 hours and 10 minutes between Bryman and Oro Grande was a casualty and an unavoidable accident, and that the delay to said train caused thereby was the result of causes which were not known to defendant, or to any of its officers or agents in charge of said employees at the time said employees left said terminal of Parker and which could not have been foreseen." (Tr., p. 24.)

BRIEF OF THE ARGUMENT.

Every argument which we will advance bears directly upon each specification of error and upon each question and proposition hereinbefore set forth for which reason, and because we believe it will promote brevity and better suit the convenience of the court, petitioner will direct its argument to such specifications and questions as a whole instead of addressing separate arguments to each.

We cannot concede that there is any such ambiguity in the wording of the proviso as will upon any theory justify the judgment under review and we will show that the contentions made by respondent throughout this litigation are at variance not only with the plain wording of the proviso and with the clear intent of Congress but also with the express declarations of the Interstate Commerce Commission communicated to Congress and that any construction of said proviso different from that for which we contend would be wholly inconsistent with practical and efficient railway operation and contrary both to law and to reason.

Facts Undisputed.

In any consideration of the questions here presented it must be borne in mind that the facts as hereinbefore set forth were uncontroverted but by again directing attention thereto we desire especially to emphasize certain important facts, urged in each court below as precluding the judgment under review, as follows:

1. That the Commission, in its Administrative Ruling No. 88 of June 25, 1908 (Tr., 30) which was promulgated as a rule of conduct for the guidance of carriers

subject to said Act, quoted the first proviso found in Section 3 of said Act and interpreted its meaning in the language following:

> "Any employee so delayed may, therefore, continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

2. That in its first report thereafter made to Congress said Commission communicated the substance of its administrative ruling last mentioned as embodying its construction of said proviso in the language following:

> "Employees unavoidably delayed by reason of causes that could not, at the commencement of a trip have been foreseen, may lawfully continue on duty to the terminal or end of that run."

In its same report the Commission not only criticized the proviso thus construed but also expressly stated that its terms are susceptible of more than one interpretation and recommended that "Congress should, by a few brief lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise," and, though the same criticism and recommendations were reiterated subsequently annually, Congress has never changed the wording of the proviso nor has said Commission ever modified said administrative ruling.

3. That the breaking of the axle was a "casualty" and an "unavoidable accident," and that the delay of 6 hours and 10 minutes thereby caused "was the result of causes which were unknown at the time the employees left the terminal of Parker, and which could not have been foreseen."

4. That among those engaged in the business regulated and controlled by said Hours of Service Act it is commonly understood that the word "terminal" as used in said Act has reference to a certain train or

crew and means the beginning or the end of the run of a particular employee—the point at which he becomes a member of a crew in charge of a particular train and the point to which it was then intended that he should accompany such train as a member of such crew and that such term as so used does not have reference to or include intermediate relay or division points which might be terminals for other crews and their trains.

5. That petitioner's railroad was well managed and operated in accordance with the best known railway custom and usage and that, while petitioner could have relieved the crew of No. 17 at San Bernardino, by placing the crew of some other train or an extra crew in charge of said train, it honestly believed that efficient railway management and the best interests of the crew required, that the wording of the proviso expressly authorized and that said administrative ruling of the Interstate Commerce Commission specifically sanctioned, a carrier to permit a crew delayed under the circumstances shown to complete its run to its home terminal—to complete the trip upon which it had started.

Circumstances Which Toll Statute.

The clear purpose and effect of the proviso in question is to provide for two separate and distinct sets of circumstances, the happening of either of which automatically suspends all of the provisions of the Act and renders them no longer applicable to service effected, after its commencement, by such happenings:

First. Those cases where excess service is due to casualties or to unavoidable accidents or to acts of God; and

Second. Those cases where delays which occasion or contribute to excess service result from causes, such as

a washout, for example, not known to and which could not have been foreseen by the carrier or its officers or agents at the time the employee delayed thereby left a terminal and started upon the trip which he is prevented by such delays from completing within sixteen hours.

The first set of circumstances is controlled by the words preceding the semicolon and the second set by the words following the semicolon and while it is not necessary that the two sets of circumstances operate conjunctively they may and frequently do.

If there remains any room to doubt whether Congress in enacting the proviso, intended to convey any different meaning than that for which we contend we may then rely, as squarely supporting our contention, upon those well recognized sources of information which may always be resorted to for the purpose of discovering the meaning in cases where the language of a statute admits of more than one construction, namely:

(1) The punctuation, taken in conjunction with the words, incorporated in the proviso as finally enacted;

(2) The debates in Congress and the various amendments proposed during the progress thereof to the bill as originally introduced as a means of ascertaining the history of the period, the surrounding circumstances and the defects which it was the object of the law to remedy.

(3) The practical, contemporaneous, executive construction placed upon the language of the proviso by the administrative body to which the execution and enforcement of the act was expressly delegated and long acted upon by those for whose guidance it was promulgated.

(4) The acquiescence of Congress in, and its acceptance of, the only executive construction of the proviso

communicated to it by the Interstate Commerce Commission.

(5) The absence of any authoritative judicial construction whereby Congress could have been influenced; and

(6) The adoption by Congress of the construction placed upon the proviso by the Interstate Commerce Commission and reported by said Commission to Congress, *by re-enacting,* without change, *the exact words of the statute* which had previously received a long-continued executive construction and which had not received authoritative judicial construction.

Punctuation As an Aid to Construction.

We realize that this court has said "punctuation is a most fallible standard by which to interpret a writing," and while we concede that it is subordinate to the text, and will not control the plain meaning of the statute, still, in cases of doubt, and especially "when all other means fail" it may be resorted to, and should operate as an aid to construction and interpretation.

Ewing's Lessee v. *Burnett,* 11 Pet., 41 (54); 9 L. Ed., 624 (630).

United States v. *Three Railroad Cars,* 28 Fed. Cas. (No. 16,513).

Blood v. *Beal* (Me., '05), 60 Atl., 427 (430).

Taylor v. *Caribou* (Me., '07), 67 Atl., 2 (4).

Tyrrell v. *Mayor et al.* (N. Y., '99), 53 N. E., 1111 (13).

In the case last cited it is said:

> "The punctuation, however, is subordinate to the text and is never allowed to control its plain meaning, but, when the meaning is not plain, *resort may be had to marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear.*" (Our italics.)

The punctuation used in the proviso in question is of material aid in learning the intention of Congress and because the semicolon is so used as to enable the language employed to bear an interpretation which will make the whole statute rational and self-consistent it is entitled to consideration as much as the language itself.

According to Standard Dictionary, the semicolon is:

> "Used in English to indicate a separation of relations of the thought a degree greater than that expressed by the comma."

Webster's Dictionary says that the semicolon is:

> "Used to indicate a separation between parts or members of a sentence, more distinct than that marked by a comma and a pause in reading usually of longer duration."

Century Dictionary and Encyclopedia, at page 5483, says of the semicolon:

> "It is used to mark the division of a sentence somewhat more independent than that marked by a comma. * * *"

In *Lambert* v. *People*, 76 N. Y., 220 (225), it is said:

> "According to well-established grammatical rules, a semicolon is a point only used to separate parts of a sentence more distinctly than a comma."

As was said in the case of *Taylor* v. *Caribou* (*supra*):

> "There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language should be rejected in the case of interpretation of statutes * * * by it the meaning may often be determined. * * * It is one of the means of * * * and may be of material assistance in determining the legislative intention. * * *"

It is manifest, therefore, that Congress clearly intended that the first part of the proviso must be read just as if it ended with the words "act of God," and that if it be established in any case, either (1) that an

employee is prevented by any casualty or unavoidable accident or act of God from completing within sixteen hours any trip upon which he started before the happening thereof; or (2) that any delay which, preventing the completion of such trip within sixteen hours, is the result of any other cause which was not known to the carrier or its officer or agent in charge of such employees at the time said employee left a terminal—started on such trip or commenced his run—and which could not have been foreseen *then and in either of such events all of the provisions of the act cease to apply to such employee, who may, therefore, complete his journey without subjecting his employer to the penalties of the Act.*

The effect of according to the proviso any other construction is not only wholly to change the meaning of the words which Congress saw fit to employ but also to deprive the semicolon of meaning and to rob it of force and effect.

The word "terminal" or the phrase "left a terminal" cannot be carried back to modify that part of the proviso preceding the semicolon without doing violence to all recognized rules of grammatical construction.

The statement that "*the provisions of this Act shall not apply in any case of casualty or unavoidable accident or act of God,* * * *" stands without any qualification or modification. The word "terminal" has no reference to nor connection with the words "casualty" or "unavoidable accident." It has reference only to such delays as are the result of a cause not known to the carrier or to its officers or agents at the time said employee left a terminal and which could not have been foreseen. It is impossible to connect the phrase "left a terminal" with the first part of the proviso; otherwise, it would be impossible to make any application of the pro-

viso to the case of a telegraph operator or train dispatcher.

It was expressly held by the Circuit Court of Appeals for the Eighth Circuit that the proviso applies to the service of operators, for in the case of *United States* v. *Mo. Pac. Ry. Co.*, 213 Fed., 169, that court, per Mr. Justice Sanborn, at pages 172-173, said:

> "The expressed terms of Section 3 make every common carrier liable for a penalty of $500 for every violation of Section 2, and declare that none of the provisions of the Act shall apply in any case of casualty, unavoidable accident or the act of God. If none of the provisions of the Act apply in any case of casualty, unavoidable accident or act of God, then the provisions of the Act which prohibit the service of telegraph operators and train dispatchers * * * do not apply in such cases, and so it is that the unambiguous terms of the Act expressly declare that the limitations of the hours of service of telegraphers and train dispatchers in Section 2 have no application in any case of casualty, unavoidable accident or act of God. * * *"

In the case of *United States* v. *K. C. So. Ry. Co.*, 202 Fed., 829 (834), the same court held that while delays due to causes usually incidental to operation "are not, standing alone, valid excuses within the meaning of this proviso, the carrier must go further and show that such delay could not have been foreseen and prevented by the exercise of the high degree of diligence demanded," from which it follows that if, as was done in the case now under review, it be shown that the cause of delay could not have been foreseen, then the proviso excuses all excess service thereby caused.

Clearly it was within the power of Congress "to prohibit the application of all or of only part of the provisions of the Act in cases of casualty, unavoidable accidents and acts of God"; but Congress made no excep-

tion and the rule, without question, is that where a legislative body makes no exception to a general and clear declaration of its will it will be conclusively presumed that it intended to make none, and it is not the province of the court so to do. *De Yturbide* v. *United States,* 63 U. S. (22 How.), 290; *Maxwell* v. *Moore,* 63 Id., 185.

This reasoning is in harmony with the expressions of this court in two cases construing the act under consideration.

In *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S., 612 (620), this court, in referring to provisions of the act controlling the service of telegraph operators which it was claimed was unconstitutional for lack of certainty said:

> "Nor does the contention gather strength from *the broad scope of the proviso* in Section 3, for if the latter, *in limiting the effect of the entire Act,* could be said to include everything that may be embraced within the term 'emergency' as used in Section 2, this would be merely a duplication and would not invalidate the act." (Italics ours.)

Our view as to the effect and meaning of the proviso is further supported by the decision of this court in the case of *Missouri, K. & T. Ry. Co.* v. *United States,* 231 U. S., 112, wherein it was urged that in one of the consolidated cases the delay was the result of a cause, a defective injector, that was not known to the carrier and could not have been foreseen when the employees left a terminal and that, therefore, by the proviso in Section 3 the act did not apply but, in refraining from considering the question because it had been raised by a motion to direct a verdict for defendant, this court said, "*the trouble might have been found to be due to the scarcity* and bad quality of the water, which was well known."

In other words, the affirmative defense had not been es-

tablished, but as we read this decision if such affirmative defense had been established, as it was by both the stipulation and findings in the case at bar, then it would have been held that the excess service had been justified.

In this view of the law an adjudication of the meaning of the word terminal as used in the proviso, while urgently desired by carriers subject thereto, is not essential to a determination of the question here involved because it was expressly stipulated and the trial court found not only that the breaking of the axle was a casualty and an unavoidable accident, but also that the delay to the train occasioned thereby was the result of causes not known and which could not have been foreseen when the crews started from Parker and, in view of such express finding, it is manifest that none of the provisions of the act could be held to apply to the trip in question because the breaking of the axle operated to suspend *all* of the provisions of the act and to render it no longer applicable to the service of employees delayed by causes expressly enumerated as tolling its applicability.

Meaning of Technical Term "Terminal."

The rule is well established that whenever a statute uses words or phrases which are technical they must be interpreted in accordance with that meaning or acceptation accorded to them by those learned in the trade to which they belong, unless it clearly appears from their context or otherwise, that the Legislature intended to use them in a different sense.

The word "terminal" as used in the proviso in Section 3 of the Hours of Service Act has a commonly understood and accepted meaning among railroad men throughout the United States, and it was set forth in the stipulation

as to facts (Tr., 26-27) and the trial court found that it means the beginning *or* the end of the employee's run—

> * * * "the point at which in the regular course of business he would go on duty as a member of a particular crew or at which * * * he would cease to be a member of such crew * * * and be relieved from duty * * * the point at which he becomes a member of a train crew * * * and the point to which it was intended at the time * * * that he should accompany such train."

The foregoing positive definition is coupled with the express stipulation and finding setting forth as a negative definition,

> "that it is not generally understood among railroad men that the word 'terminal' as applied to any particular train or crew refers to a relay or division point between the point at which an employee became the member of a crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the run or the terminal for other crews and other trains."

If, notwithstanding these stipulated definitions there still remains any doubt as to the meaning of the proviso, then, as this court, through Mr. Justice Brewer said, in *Smith* v. *Townsend*, 148 U. S., 490 (494), 37 L. Ed., 534:

> "It is well settled that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy."

It is impossible successfully to deny that where Congress passes a statute dealing with railroads and especially dealing with trainmen employed by such railroads; and in the act expressly imposes upon a commission, whose business it is to deal with railroads, the duty "to execute and enforce the provisions of this Act," then the

word in question is to be taken in the sense which custom and usage have thus given to it. *Ex parte Hall,* 18 Mass. (1 Pick.), 261; *Green* v. *Weller,* 32 Miss., 650; *Quigley* v. *Gorham,* 5 Cal., 418.

That definition of the word "terminal" as used in the act as stipulated to and incorporated in the findings of the trial court is in strict accord with the intent of Congress in its use in the proviso, will appear by reference to those parts of the Congressional Record which reflect the debates upon and the various amendments to the bill originally introduced.

The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by referring thereto for the purpose of ascertaining the history of the period when the statute was adopted or as a means of determining conditions which the statute was designed to remedy for, as was said in this court in *Standard Oil Company* v. *United States,* 221 U. S., 1 (50), 55 L. Ed., 619 (641):

> "Although debates may not be used as a means for interpreting a statute * * * that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is the history of the period when it was adopted."

Purpose of the Proviso.

A carefully prepared statement showing the various amendments proposed to the Hours and Service Act as originally introduced and remarks which clearly indicate that the object of Congress was to permit crews delayed en route by causes specifically mentioned to complete the journey or trip upon which they had started is submitted as an appendix hereto and is respectfully commended to the attention of the court with the request that it receive the same consideration as though here set forth at length.

The clear purpose of the proviso was to incorporate into the law some clause, which without enumerating all contingencies to which it was recognized that railway operations were subject, would expressly authorize crews which, after starting upon their run, met with casualties or unavoidable accidents or encountered delays as the result of causes which were not known and which could not have been foreseen before the crews started to complete the runs thus commenced to the point for which they had started without subjecting their employer to the penalties of the act. It is obvious that that was the sole object and purpose of the language employed for it is impossible to conceive of any other object, otherwise there would have been no occasion whatever for the proviso. Had Congress intended that crews delayed by the causes mentioned be relieved as soon as possible thereafter it would have so stated.

To insure adequate rest after protracted service was fully as much the object of the law as was the prevention of excessive continuous service and it is clear that Congress recognized that conditions too numerous to detail might arise which would at times prevent trainmen from completing their runs within sixteen hours, but that the necessities of railroading and the best interests of the employees both justified a provision which would permit crews to finish the runs upon which they had started, providing an adequate period for rest and recuperation was insured to employees who, by reason of casualties and causes not known when they started upon their runs, were necessarily subject to service more protracted than could have been anticipated.

The statute was passed in view of the practical operation of railroads and should receive a practical and reasonable construction. As shown in the appendix hereto, setting out the proceedings in Congress, that body

well understood that, with respect to trainmen, each crew had a designated run at each end of which the members thereof would arrange for accommodations for resting, etc. Therefore, it was well understood that such run ought not to be interfered with or covered by the provisions of the Act in exceptional cases of casualty, unavoidable accident, or act of God; nor in case where a delay in the usual operation of the train was caused by something unforseen by officials in charge of the crew and which could not have been prevented when the crew started on its journey. Such instances would not be frequent. The purpose of the law was not to make radical changes in the methods and rules adopted upon first-class railroads, but rather to prevent departures therefrom in cases not reasonably warranted.

Thus in the committee's report to the House of Representatives, made by its chairman, Mr. Esch, upon the bill which finally passed both houses (Report No. 7641, 59th Congress, Second Session), it is stated, quoting first from the 1904 Report of the Interstate Commerce Commission:

> "There are a few roads that have stringent rules to guard against the overworking of trainmen, but in most cases the matter is left entirely to the discretion of the men and to subordinate officials immediately in charge. These subordinate officials, in their eagerness to keep traffic moving frequently overtax the men, and in many cases the men themselves, through greed for making big pay, willingly remain on duty for excessive periods of time."

There is then quoted from the 1905 Annual Report of the Interstate Commerce Commission, as follows:

> "The need of a high standard in this respect and of care on the part of supervisory officers to see that proper regulations are maintained and obeyed is quite generally recognized, and a considerable number of railroads have prescribed rules limiting

the hours of work and providing suitable rest periods; but these rules often appear to be very poorly enforced.

* * * * *

The disposition of men to work beyond reasonable limits of physical endurance for the sake of facilitating the business of the railroad or to increase their earnings may be seen in other departments than the train service. Signalmen, who usually work regular turns of twelve hours each, sometimes take each other's places in cases of sickness or an unexpected call of a man away from his home, and thus remain on duty thirty-six hours at a time." (pp. 3 and 4.)

It is then stated in the committee's report:

"Although this bill makes into law agreements now existing between the companies and the various brotherhoods and makes as the maximum of continuous service that which now is left for the most part to the wish or consent of the employes themselves, the old and oft-repeated argument was made that the business of railroads was private business, and hence ought not to be subjected to legal restraints," etc.

After referring to the rest rules of certain railroad companies mentioned, the report continues on page 7:

"More rules of like character on important railways of the United States might be given, but these rules seem to be of the same general character, leaving the matter of excessive hours largely, if not entirely, in the discretion of the men themselves. * * * Under the present system of agreement between the companies and the brotherhoods, by the terms of which it is largely discretionary with the employe as to whether he shall work hours in excess of his contract or not, traffic managers or those responsible for transportation do not hesitate to discipline men who invoke the aid of their contract in support of rest when called upon to perform excessive hours of labor, and it is the fear of being disciplined and ultimately of being discharged that makes many men work to excess.

The passage of the pending bill will, on the one

> hand, permit the railroad companies to defend themselves against the cupidity of some of their employes who desire to work excessive hours for the sake of an increase in their earning, and on the other hand, will permit the employes to protect themselves against being disciplined or discharged because of a demand made upon them to work excessive hours."

Congress was legislating with reference to existing conditions. In using the word "terminal" as applied to trainmen it knew that their run was between two points called "terminals," at which places they had appropriate arrangements for rest, etc. They would be greatly inconvenienced by being required to stop off at some intermediate point for rest where no arrangements therefor were made.

In providing "when such employe left a terminal," etc., Congress had in mind a terminal or point out of which the particular crew would start on its run to the other terminal. It did not mean *any* terminal, which, due to any accidental junction of lines or branches, might be created intermediate to accommodate crews running on other lines or between other points. "A terminal" meant that of the particular crew. The sentence in which it is used has reference to a train crew and the delay thereof. Neither Barstow nor San Bernardino was "a terminal" of this particular crew.

Executive Construction of Proviso.

The construction placed upon a statute by the officers whose duty it is to execute and enforce it is entitled to great consideration.

This is especially true in those cases where the construction had been observed and acted upon for many years, and in such cases the courts are not disposed to disregard such executive construction unless it is clearly

erroneous, especially where the statute prescribes a penalty and such construction is in favor of one affected thereby or has been impliedly endorsed by the legislative body which enacted the law.

The only construction of the proviso which the Interstate Commerce Commission ever reported to Congress was that "*employes unavoidably delayed by reason of causes that could not, at the commencement of the trip have been foreseen, may lawfully continue on duty to the terminal or end of that run.*" (I. C. C.'s. 22d Annual Report, page 50.)

This is in substance what was said by said Commission to the carriers by Administrative Ruling No. 88 of June 25, 1908, wherein, after quoting the proviso it was stated:

> "Any employe so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

The fact that the commission in the first report which it made to Congress after the effective date of the act construed the proviso as herein pointed out and in the same report criticized the proviso, suggested "that Congress should, by a few lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise" and recommended "That the commission's authority in respect of the enforcement of the hours of service law be made more definite" when coupled with the fact that Congress, by refraining from amending the language so criticized, approved and adopted the construction of the proviso so communicated to it renders particularly applicable to this case the rule so often announced by this court and succinctly stated in *Heath* v. *Wallace,* 138 U. S., 573; 34 L. ed. 1068, as follows:

> "Moreover, if the question be considered in a somewhat different light, viz., as the contemporane-

ous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

The foregoing rule is reiterated in numerous cases, including:

Penoyer v. *McConnoughy,* 140 U. S., 1 (25).
Brown v. *United States,* 113 U. S., 568 (574).
United States v. *Moore,* 95 U. S., 760.
United States v. *Ala. R. R. Co.,* 142 U. S., 616.
United States v. *Corecede,* 209 U. S., 377.

Particularly applicable here is the holding in *United States* v. *Finnell,* 185 U. S., 236, 46 L. ed. 890, where this court at page 244, speaking through Mr. Justice Harlan, said:

"Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. * * * But if there simply be a doubt as to the soundness of that construction—and that is the utmost that can be asserted by the government —the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. * * * Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interest."

Again, in *United States* v. *Johnson,* 124 U. S., 236, 31 L. ed. 389, it was said:

"In view of the foregoing facts the case comes fairly within the rule, often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for

cogent reasons, and unless it be clear that such construction is erroneous."

It is well understood that the reasons why Congress allowed one year between the passage and the taking effect of this act was to permit railways affected by its provisions to effect any rearrangement of their "terminals" as that word is used in the act, or other facilities or to make any other readjustments which might be necessary in order that the runs of trainmen might fit the prescribed sixteen hour limit. This was recognized in the case of *Northern Pac. R. Co.* v. *Washington,* 222 U. S., 370, 56 L. ed., 237, where this court, through Mr. Chief Justice White, at page 379 says:

> "In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act,—a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted."

The Interstate Commerce Commission knew, when it issued its Administrative Ruling No. 88 of June 25, 1908, that carriers subject to the act had, during the year allowed for that purpose, established exclusive relay points for engine crews, for freight crews and for passenger crews and for local as well as through passenger crews respectively, and that they had so arranged the runs of such crews as to secure compliance with the act, and there is not one word in any ruling of said Commission indicating any desire or intention on its part to disturb the arrangements and readjustments so made.

The Commission must have had these conditions in mind when it promulgated its first Administrative Ruling of March 16, 1908, in which, after referring to the instances enumerated in the proviso, it said: "They

serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point," but such ruling is so obviously in contravention of the plain words of the proviso that it was never reported to Congress and was thereafter superseded by Ruling No. 88 of June 25, 1908, with which it cannot be harmonized.

Nowhere, from the inception of the act down, has it ever been suggested that the word "terminal" had or could have any other meaning in the law than the beginning or end of the appointed run. This construction is supported by the stipulated definition incorporated in the findings of the trial court, and it is respectfully submitted that because of that fact and because of the Administrative rulings as reported to and acquiesced in by Congress, respondent is estopped from claiming either that the word "terminal" means any terminal or relay point through which a crew delayed by the excepted causes may pass enroute to its destination, or that the Administrative Ruling of March 16, 1908, which was never reported to Congress, was not completely superseded by the later Administrative Ruling of June 25, 1908.

Judicial Construction.

That there is such a lack of uniformity of rulings among the District Courts and Circuit Courts of Appeal as to render necessary an authoritative decision by this court was urged in our Petition for the Writ issued herein, wherein it was pointed out that the decision in this case is at variance with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *United States* v. *Northern Pacific Railway Company,* 215 Fed., 64 (67), wherein said court, after having found that the delay was the result of an unavoidable accident,

a cause which could not have been foreseen, expressly held that the happening thereof justified the carrier's failure to relieve the employees so delayed, although it was known before they started upon their return trip that they could not complete their run without infracting the provisions of the second section of the act. *These two decisions cannot be reconciled.*

The well-reasoned opinion of United States District Judge Sawtelle in the case of *United States* v. *Atchison Co.*, 212 Fed., 1000 (submitted in full as Appendix II. to Petition for Writ of Certiorari), is the first published and most logical decision involving the identical question here presented. That case involved a delay by casualty to an opposite train, No. 18, to that here involved while enroute from Los Angeles to Parker, and the decision construes the word "terminal" and the Commission's Administrative Ruling of June 25, 1908, in exact accord with the contentions here presented.

The holding of the Circuit Court of Appeals for the Second Circuit in *United States* v. *New York Cent. & H. R. R. Co.*, 218 Fed., 611, clearly indicates that it is not the view of that court to require that crews delayed by causes enumerated in the proviso be relieved to prevent excess service as is evidenced by the syllabus, which correctly reflects the holding of the court as follows:

> "Where a hot box constituted a sufficient excuse for delay of a train, compelling employees to work beyond the service prescribed by the Hours of Service Law, the delaying of the train necessitated by waiting for other trains to pass, necessarily resulting from the hot box, should be computed in figuring the time of excused delay."

The Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Kansas City Southern Ry. Co.*, 202 Fed., 829 (834), holds that while delays due to causes incidental to operation and which might reasonably have

been foreseen *"are not, standing alone, valid excuses within the meaning of this proviso, the carrier must go further and show that such delay could not have been foreseen and prevented by the exercise of the high degree of diligence demanded,"* from which it logically follows that if it be established, as was done in the case under review, that the cause of delay could not have been foreseen, then excess service is excused under the proviso.

The decision of the same court in *United States* v. *Great Northern Ry. Co.*, 220 Fed., 631 (633), is harmonious with the construction for which we contend. This decision construes the proviso as a statement by Congress to the railroads that "you need not pay penalties for violations in the following instances" and, though analyzing each instance specified, does not even suggest the existence of any duty to relieve in order to minimize excess service.

The Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Missouri Pac. Ry. Co.*, 213 Fed., 169, holds that the proviso exempted carriers from liability for penalties when in cases of casualty or unavoidable accident it permits operators to remain on duty in excess of the period prescribed by section 2 of the act, and does not even intimate that there is any duty to relieve to reduce the period of excess service, although a relief operator could have been procured.

In no case save that under review has any court which has been called upon to construe the proviso undertaken to read out of the statute that which Congress saw fit to incorporate or to read into the statute provisions which Congress had not included therein. The statute contains no words which can properly be construed to require a carrier to relieve a crew delayed by one of the causes

enumerated in the proviso, and, as was said by this court in *Hobbs* v. *McLean*, 117 U. S., 567; 29 L. ed., 940:

> *"When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."*

Particularly applicable here is the language of Mr. Justice Brewer in answer to an argument based upon the consequences of an act of Congress against the meaning expressed by its words in *United States* v. *Goldenberg*, 168 U. S., 103; 42 L. ed., 398:

> *"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."*

Legislative Construction.

It cannot be argued successfully that the subsequent re-enactment by Congress of the proviso without change in wording was induced or influenced in any way by any judicial construction of the act because:

First. The decisions of the Circuit Court of Appeals of the Ninth Circuit were not harmonious, as we have shown;

Second. The decisions of the Circuit Courts of Appeals of other circuits were not in accord with that in the case under review, as has been pointed out; and

Third. The questions involved had never been passed upon by this court, in which this cause and another involving identical questions were pending at the time of such amendment.

Re-enactment After Executive Construction.

It cannot be denied that whenever a statute which has received a practical construction by an executive department of the government has been re-enacted in the same

or substantially the same terms, the legislative body is presumed to have been familiar with and to have adopted such construction as a part of the law unless it expressly provides for a different construction.

By an Act of Congress approved May 4, 1916 (S. 3769—Pub. 68), Section 3 of the Hours of Service Act was re-enacted *without change in the wording of the proviso under consideration* to provide, in accord with a recommendation of the Interstate Commerce Commission, for a minimum penalty of $100 for each violation.

The only construction of the proviso which the Interstate Commerce Commission *ever* reported to Congress was that *"employees unavoidably delayed by reason of causes that could not, at the commencement of the trip have been foreseen, may lawfully continue on duty to the terminal or end of that run."*

This court, in the case of *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S., 361 (402); 50 L. ed., 515 (525), had occasion to consider certain rulings of the Interstate Commerce Commission bearing upon the construction of certain provisions of the Interstate Commerce Act and the Court, through the present Chief Justice, Mr. Justice White, there said:

> *" * * * without reviewing the rulings made by the Interstate Commerce Commission in these cases and which have been adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the Act to regulate commerce is now binding. * * * We make this concession because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which practical construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars con-*

strued, when not plainly erroneous, must be treated as read into the statute."

Thereafter, in *Copper Queen Con. Min. Co. v. Arizona*, 206 U. S., 474 (479); 51 L. ed., 1143 (1146), it was said:

" * * when, for a considerable time, a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."*

We submit therefore that Congress not only by refraining from amending the act but also by re-enacting the proviso without change, accepted a construction of the act with which it is impossible to reconcile the judgment under review.

Conclusion.

The practical effect of the judgment under review is to make every carrier subject to the Hours of Service Act an insurer against service by its employees in excess of sixteen hours regardless of causes or necessity. In order to underwrite its liability for penalties each carrier would be forced to have available at all times and places a sufficient number of extra crews to relieve any crew which, during the course of its run, might encounter delays by reason of causes expressly enumerated in the proviso as rendering the statute no longer applicable.

A complete answer to the unreasonable contentions made by respondent in both courts below is found in *United States* v. *Atchison Co.*, 220 U. S., 37; 55 L. ed., 361, where it was said, *"This hardly is a practical suggestion."*

Congress postponed the effective date of the act for one year to afford carriers the opportunity to make

arrangements and readjustments necessary to enable them to comply with its terms.

Congress charged the Interstate Commerce Commission with the duty of enforcing the act which carried with it the further duty of interpreting the act.

The Interstate Commerce Commission did interpret the act and repeatedly published such interpretation for the guidance of carriers and reported to Congress its interpretation that employees delayed under circumstances enumerated in the proviso, and found to have existed in the instant case, might lawfully *"continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip"*—an interpretation which would permit petitioner to do lawfully just what it did in this case. Petitioner relied upon such interpretation and had no reason to believe that any attempt would be made to repudiate it. The only interpretation ever reported to Congress is wholly irreconcilable with the earlier ruling which was not so reported, but even if the two rulings could be read in connection with each other without doing violence to the clear, plain wording of the proviso, the failure of the Commission to make any mention of the earlier ruling in its report to Congress after the effective date of the act evidenced a clear intent to abandon the earlier ruling and to adopt as its only interpretation of the proviso the unambiguous expression contained in the later ruling which employs words so plain, simple, direct and expressive as to leave no doubt as to their meaning. By the later ruling the "terminal" is fixed at the "end of the run" or "trip"—"run" and "trip" are used interchangeably and each term serves to emphasize the other.

If the Administrative Ruling of March 16 conflicts or is inconsistent with the ruling of June 25, then, to the

extent of such inconsistency, the earlier ruling must fall and the later must prevail; and if it be insisted that the necessary effect of the earlier ruling was to require carriers to relieve employees at any terminal or relay point short of the *end of the run or trip,* then, clearly, the earlier ruling must fall. The two rulings cannot stand together, because the later ruling says nothing whatever about the application of the statute being waived *"only until such employees so delayed reach a terminal or relay point,"* but declares in express terms that *"the proviso quoted removes the application of the law to that trip."*

Congress, by inaction, concurred in the interpretation of the proviso communicated to it by the Commission, and such interpretation became for petitioner an integral part of the law to a like extent as though it had been expressly incorporated therein.

Notwithstanding all this, the Commission without previous notice to carriers subject to the act and without any modification or rescission of its Administrative Ruling of June 25, 1908, procured the commencement of this action and by so doing took for the first time a position which was not only contrary to the only interpretation of the law which it had communicated to Congress and persuaded the Appellate Court to hold that under the proviso petitioner was "only justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence, have relieved it."

The course of conduct pursued by the Commission operated to place all carriers subject to the act at a distinct disadvantage, in that it tended to set at naught the arrangements and readjustments which they had made during the one year period allowed by Congress for that express purpose.

The effect of the judgment under review is not only to brand as a law-breaker a well-managed railway com-

pany which was acting in good faith upon an interpretation which was in effect when it permitted acts expressly authorized by such interpretation, but is also to deprive petitioner of its property.

The contentions which respondent successfully urged upon the Appellate Court violate not only the words but also the spirit of the proviso, and their effect is to interpolate into the proviso expressions and requirements not placed therein by Congress.

Section 2 of the act requires that employees who have been on duty for sixteen consecutive hours shall be relieved, but neither the duty to relieve nor any of the other provisions of the act apply "in any case of casualty," and after having found that the broken axle constituted a casualty within the purview of the statute, the Appellate Court was not justified in finding that the duty to relieve remained after the happening of that which rendered the act no longer applicable.

If, as the proviso clearly states, the effect of the happening of a casualty, an unavoidable accident, or of a delay resulting from an unknown and unforeseeable cause is that "*the provisions of this act shall not apply,*" then neither the requirement for relief at the expiration of sixteen hours, nor any other requirement of the act, remained after the happening thereof until the completion of the journey delayed by reason of one of such specifically enumerated causes.

We feel confident that this court will not countenance the unreasonable claims which have been made by respondent regarding the requirements of the act, and that it will not hold that practical and efficient railway operation requires either that crews which are delayed by causes which expressly suspend the operation of the statute are required to be "tied up" on the road or

released at the expiration of sixteen hours, or that carriers are legally bound to maintain at each and every division point and elsewhere along their lines a sufficient number of extra crews to insure against any crew working in excess of sixteen hours regardless of the cause rendering such service necessary, advisable and entirely consistent with the duty which the carrier owes both to the public and to its employees; neither do we believe that it will be held that a carrier is required to abandon or subject to delay the operation of any one train in order to relieve the crew of another train to which the provisions of the statute have been rendered no longer applicable.

Respectfully submitted,

ROBERT DUNLAP,
E. W. CAMP,
PAUL BURKS,
Attorneys for Petitioner.

GARDINER LATHROP,
Of Counsel.

APPENDIX.

EXTRACTS FROM CONGRESSIONAL RECORD SHOWING SOME AMENDMENTS INDICATING SUGGESTED CHANGES IN WORDING OF PROVISO AND REMARKS INDICATING PURPOSE OF PROVISO.

(Figures in parentheses refer to volume and page of Congressional Record.)

SENATE PROCEEDINGS.

On March 15, 1906, during the first session of the Fifty-Ninth Congress, Senator La Follette introduced S. B. 5133 which, as modified by various substitutes and amendments, is the present Hours of Service Act. The bill, which, as originally introduced, invested the Interstate Commerce Commission with full power to prescribe the hours of service of employees connected with train movements, was referred to the Committee on Education and Labor. (Vol. 40, page 3838.)

Amendments Proposed.

On June 26, 1906, said committee, through Senator Dolliver, by its report No. 4246, submitted by way of amendment a substitute bill which fixed the maximum of service of employees engaged in the movement of trains at sixteen hours instead of leaving it to the commission, and which contained the proviso following:

> " * * * except when by casualty occurring after such employee has started on his trip he is prevented from reaching his terminal; * * * "
> (Vol. 40, page 9259.)

On June 27, 1906, Senator Gallinger proposed as an amendment to the proviso last quoted, the following:

> "Except when by unavoidable accident, or act of

God, or resulting from a cause not known to the carrier or its agents in charge of such employee at the time he left the terminal."

(Vol. 40, p. 9363.)

On June 27, 1906, Senator La Follette proposed an amendment adding to the last three amendments submitted by Senator Gallinger the words:

"or by unknown casualty occurring before he started on his trip."

(Vol. 40, page 9372.)

Senator Foraker had theretofore proposed an amendment making the proviso read:

"Except when by casualty occurring after such employee started on his trip, but is prevented from reaching his terminal."

(Vol. 40, p. 9265.)

On January 8, 1907, Senator Dolliver offered an amendment which while eliminating the proviso and making the provisions of the act absolute, delegated to the Interstate Commerce Commission authority, after full hearing and for good cause, to "specify the extraordinary circumstances or special cases" under which common carriers might be exempted from the provisions of the act. (Vol. 41, p. 767.)

On the same day Senator Gallinger proposed an amendment adding to the bill a new section reading:

"Sec. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their consent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed in the ordinary course of business of the carrier, within sixteen hours."

(Vol. 41, pp. 757, 828.)

On January 9, 1907, Senator Brandegee presented his amendment in the nature of a substitute for the pending

bill, which prohibited service of more than sixteen consecutive hours:

> "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching his terminal. * * *"
>
> (Vol. 41, p. 828.)

On January 10, 1907, Senator McCumber submitted an amendment adding to the amendment proposed by Senator Dolliver the words following:

> "or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal."

Senator Bacon offered an amendment containing the words:

> "except when on account of emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching his terminal."
>
> (Vol. 41, p. 888.)

On January 10, 1907, Senator La Follette offered a substitute bill which contained the proviso following:

> "except when by *casualty occurring after* such employee had started on his trip or by unknown casualty occurring before he started on his trip, he is prevented from reaching *his terminal.*"
>
> (Vol. 41, p. 896.)

Senator Gallinger then moved to amend the foregoing so as to make it read:

> "except when by unavoidable accident, or act of God, or resulting from a cause not known to the carrier or its agent in charge of such employee at the time he left the terminal."
>
> (Vol. 40, p. 891.)

Senator Scott, "at the request of a number of engineers," proposed to add at the end of the bill the following:

> "This act shall not apply to cases where a con-

tinuance on duty beyond sixteen hours will enable an employee to reach a terminal; provided, that at the expiration of sixteen hours he is within twenty miles of such terminal."

(Vol. 41, p. 893.)

During the pendency of the bill in the senate twenty-five or more amendments, most of which bore upon the proviso, were proposed, eight of which were offered by Senator La Follette, who on January 10, 1907, offered a substitute, with the proviso amended as suggested by Senator Bacon, worded as follows:

"except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal."

(Vol. 41, p. 895.)

Remarks of Senators.

On June 26, Senator McCumber, in commenting upon the necessity of the proviso, said:

"* * * In the western section of the country, * * * where you may run probably two hundred miles without finding any place where it is desirable for employees to live, it is necessary to run closely on time, and also to make extremely long runs in order to get from one important place to another important place, or such a place as any one would want his home to be.

The times and schedules are so arranged that on the whole there would be very little difficulty or very little danger of overrunning the sixteen hours, which is the limit prescribed by this bill, but we will suppose that on a westward run * * * a train would be belated, not by reason of what we would denominate a casualty, but because of a lack of steam or because at certain seasons the amount of freight traffic would be so heavy that the whole train crew would be delayed possibly one or two hours, or even

ten minutes, and could not reach their destination within the sixteen hour limit. Under the bill as it now reads, unless the delay were by reason of some unlooked for accident or casualty the conductor could not run his train ten minutes longer to get home. The crew could not pull in the train to where it was to be made up or start again with a new crew, but it would be necessary to ship out another crew fifteen or twenty or fifty miles and the train would have to be held up at a way station that long in order to get another crew there to take the train from where it was. * * * When you are crossing the continent you have to go over bare stretches of country, and in order that the employees and their families may have a liveable place for residence they have got to make, sometimes, more than a twelve-hour run. * * * If the train should be delayed five hours by reason of * * * anything that does not amount to a casualty, the crew would not get to their homes that night, but would have to tie up and abandon the train out on the prairie somewhere. I have not heard the slightest complaint on the part of employees on those vast stretches of country that they were compelled to work too long hours. * * * Ninety per cent of them would rather spend the extra hours with the train.

I might mention a great many objections that trainmen * * * have in being deprived of going through to their homes at the end of their journey, though they may be one or two or five or six hours late. Every one of them would prefer to do that and especially on a passenger train."

(Vol. 40, pp. 9263, 9264.)

On the same day Senator Warren said:

"It seems to me that in consideration of the well-known fact that there are a great many contingencies and incidentals and intricate details that come up in railroad business, impracticable to regulate by legislation, we ought to feel safe in leaving it to railroad employers and employees and let them continue to mutually arrange it, so long as they are agreed and make no complaint here or elsewhere. * * * But I am not going to oppose the principal or alleged purpose of the bill, but I do demand that

the bill shall be radically changed and in the interest of the trainmen themselves. * * *

* * * You sometimes have the entire road tied up and * * * you either have to take out on the road men who have had less than ten hours rest or have to hold trains and get further and further behind and further demoralized. * * * I say it is impracticable in the interest of the railway men themselves to pass such a law without proper amendment and some elastic provision. * * *

The railroad must depend upon the regular men who have regular runs, and lengthen the hours of work and shorten the hours of sleep, when they get in a tight place, which ought to seldom happen, and I think it ordinarily does happen seldom."

(Vol. 40, pp. 9264-5.)

Senator Foraker said:

"* * * I think the first provision prohibiting their employment for a longer period than sixteen hours is guarded by the exception of casualty, in cases of accident, where there is unexpected delay. I suppose that any kind of unexpected thing happening making necessary their employment for a longer time would come within this provision of the proposed statute, and with that I am satisfied."

(Vol. 40, p. 9265.)

Senator Bailey, in suggesting a revision should be made for twelve instead of sixteen hours' service, said:

"Surely when we permit in an extraordinary emergency the extension of the time limit, we ought to reduce it to twelve instead of sixteen hours."

(Vol. 40, p. 9265.)

On June 27, 1906, Senator Gallinger directed attention to the statements of numerous railroad officials, which pointed out that:

"It is impossible to keep a sufficient number of men in the service during the light months to protect the traffic offered during the heavy months, because such a large number of men could not make a living, and would not, therefore, remain idle, or partially idle during the light months. * * * It

(the bill) would cause idleness of a considerable number of engines while the crews are waiting for rest. It would, in many cases, require live stock to be held in the cars while the crew is taking a rest between terminals, or until a crew could be sent out to make the relief. * * * I do not believe that the representatives of the men would approve these bills so drawn, because if such bills are passed it will in many cases deprive these men of the right to take their lay-over at their home station; in fact, it would in many cases require that they be stopped for rest within a few miles of their homes."

(Vol. 40, p. 9363.)

On June 29, 1906, Senator Gallinger said:

"It is in very exceptional cases that a railroad requires sixteen hours' service, the rule being that the men are not overworked."

(Vol. 40, p. 9667.)

Senator Carter remarked:

"Emergencies we cannot legislate to meet; emergencies must be met by men as best they can meet them."

(Vol. 40, p. 9667.)

On the same day Senator Carter directed attention to the statements made by representatives of the trainmen before the Industrial Commission, in which appears the statement of Mr. F. B. Sargent, Grand Master of the Brotherhood of Locomotive Firemen, following:

"You cannot put railroad men in the transportation department upon the same basis upon which men work at trades in factories and shops. The handling of transportation is an entirely different matter. For instance, I am called today to go out upon a run. I am on duty thirty-six hours before I am relieved. Certain conditions may arise, as have this year to my knowledge—storms and conditions of weather—whereby the men are on duty for thirty-six hours before they are relieved from their engines. *Those are conditions that cannot be controlled by any specific law or regulation.* We believe that there is manifest on the part of the railways a

disposition to be as fair and equitable in the establishment of hours of labor for train service employees as is practicable with the business to handle. At the present time the railroads are flooded with business and the men are working constantly, you might say, many of them under very severe strain. If a man is not able to go out, does not feel that he can go, as a general rule he has no trouble in getting excused if they have a man to place in his position. Oftentimes trains are held while the men get a sufficient amount of rest to go and perform their duty. * * * The men in the railway train service do not want an overproduction; they do not want the railroads loaded down with a great army of men in order that they may have it easy the whole year round. * * * They are willing to take it rougher and work a little harder in the busy season, then when the dull season comes there is plenty of time to rest up and earn fair wages. *The railroad employees have an understanding with the employers that there shall be no more men employed than is necessary to move the traffic with dispatch,* and during the busy times they take advantage of it and earn big wages, and when the dull season comes of course they earn an average wage. * * * The train service with which I am associated—the firemen—are not seeking any legislation to reduce the hours in which they work. * * * There is no serious complaint at the present time. * * * *The necessity of changing train and engine crews at established points where terminal facilities are provided renders it impracticable to arbitrarily fix the hours of labor of train and engine men.*" (Our italics.)

(Vol. 40, p. 9670.)

On January 8, 1907, when proposing his amendment, Senator Gallinger, in support thereof, offered numerous letters from organizations and representatives of enginemen and trainmen opposing the bill and which contain such expressions as "it would in many cases be a hardship on engineers to get within a few miles of home sometimes and have to stop for rest," and "any legisla-

tion which will make it necessary for the employees in the train service to spend their rest time away from home instead of at home and with their families is a serious one and should be very earnestly considered before it is passed," and in referring to such protests of the men Senator Gallinger said:

> "They prefer to work a short time over the sixteen hours and to return to their homes and then to have the day off at their homes enjoying the companionship of their families. * * * All that my amendment contemplates is to permit the railroad companies with full consent of their employees to allow trifling additional time on a run where ordinarily sixteen hours is a sufficient time in which to make the run. * * * We do not want a rule so exacting, so inelastic, that it will work to the disadvantage of the very men whom we are attempting to legislate for. * * *"
>
> (Vol. 41, pp. 757, 758.)

Senator Warren, in speaking on the proposed bill, said:

> "I have been receiving hundreds of letters about it. I have between 100 and 200 letters and telegrams here now on my desk from employees of western railroads, every one of them protesting against the bill in its form as before us. (At pages 759-762 several of such letters are set forth and commented upon, and Senator Warren said further): All of these letters, while directed to the defeat of the measure, are in my mind so directed because of the lack of flexibility of the bill. * * * In my judgment these men * * * would readily support a bill as I would * * * if the bill should be so framed that such a law could be enacted as would provide for all of these contingencies * * * and leave it so that trainmen and superintendents might have some 'elbow room' in the running of trains."
>
> (Vol. 41, pp. 758-762.)

Senator McCumber, in discussing the bill, said:

> "The only question so far as it affects the section

of the country from which I come is the question that crystallizes around this word casualty. * * * If it should so happen that without this broader term of the happening of a 'casualty' a train would be delayed, certainly we ought not to make it a criminal offense if the men were required to remain over a little more than sixteen hours from the time that they had had rest or that they could go out again upon a less number of hours' rest than ten hours, which the bill now provides. I hope, Mr. President, we shall so amend this bill that it will have sufficient elasticity to meet occasions of this kind."

(Vol. 41, pp. 762-763.)

Thereupon Senator Patterson said:

"So far as the objections made by the Senator from New Hampshire (Mr. Gallinger) is concerned, I doubt if it is amply provided against in the bill. I can hardly imagine any cause for a delay in a trip one way or a round trip, that would not be covered by the term 'casualty.' So that if a train starts out on a round trip that would under the schedule be completed in twelve or thirteen or fourteen hours, if, for almost any cause, it was delayed beyond sixteen hours, there would be no necessity for the employees abandoning the train and a new crew being put in their places, for it is only in the event of a casualty interfering to prevent the completion of the run within the sixteen hours that the crew may not continue on the run *until the run is finished.* * * * If the locomotive should run out of coal, or if water should not be accessible, or if a rail should be misplaced, or a freight train or any other kind of a train should run off the track, I am inclined to think that that mishap would come under the term 'casualty.' * * * Perhaps a broader term might be used, *but a fair construction, it seems to me, would prevent the companies being compelled to change train crews under the term that is used in the bill, whatever might be the cause of delay.*"

(Vol. 41, p. 763.)

Thereupon Senator Heyburn remarked:

"A lay-over at a point of a wreck, miles distant from any settlement, would not afford the crew of

the train an opportunity to rest. It could not possibly result in any benefit to them in the way of re-equipping them for further service; and there should be such elasticity in this measure as would permit those men to pursue their duties. But to say that a crew of railroad men shall remain in idleness at a point of disaster which may not have occurred within the scope of the exception of this bill —and I can imagine many of them that would not be within that exception of 'casualty'—to say that they must lie there in idleness and practically afford no assistance to relieve against the damage or delay, would certainly be of no benefit to the railroad or men and would tend nothing to accomplish the purpose sought to be accomplished by this bill. The word 'casualty,' as it has been presented by the senator from Colorado, would seem to be broad enough to cover almost any kind of delay, but the text of the bill limits it to casualty occurring after such employee has started on his trip. The cause of delay may have existed for a considerable time before the train started out on its trip. There is an amendment proposed to cure that which says 'or by unknown casualty occurring before he started on his trip.' There may be a casualty that is known to exist and the trainmen may start out for the purpose of relieving against the damage, expecting to be able to accomplish the work and return within the time limited by the proposed act, and instead of being able to do so they may be detained there hours or days, as the case may be. So, as I say, in that provision the bill is not elastic enough. Otherwise, you would find yourself with a dead crew on hand where they had started out with full knowledge that there has been a landslide or a train ditched, or any of the many casualties which might occur, with the expectation of being able to overcome it within a few hours, and, as I have suggested, be held there for many hours and the sixteen hours might expire."

(Vol. 41, pp. 764-765.)

On January 9, 1907, Senator Bacon offered communications from certain railway employees, conductors and others, requesting "that you do all in your power to so

amend this bill * * * so that unavoidable and unforeseen accidents be excepted and in favor of the men that when an hour or two will get them to their home terminal be excepted * * *" and then said:

> "A railroad employee starting from his home and making, it may be, a hard run to the other terminal, is very desirous to get back to his home and have his rest there. * * * It would be better for them, looking to the question of their physical recuperation, to say nothing of their comfort and domestic happiness, if they were permitted to take the larger part of their rest at their home terminal and not be required to take an undue portion of it at the far-away terminal."
>
> (Vol. 41, p. 823.)

Thereupon Senator Dolliver, in reply to Senator Bacon, referred to his proposed amendment delegating to the Interstate Commerce Commission the power to determine the instances in which the act should not apply and said:

> "The very reason that I felt constrained to offer the amendment was the difficulty in making a particular description of the circumstances which would warrant exemption from the operation of the law."
>
> (Vol. 41, p. 824.)

Thereupon Senator Patterson offered four, out of more than one hundred, letters from trainmen, each directing attention to the fact that:

> "There are occasionally circumstances and conditions—storms, wrecks, washouts, etc.—where it is impossible for a dispatcher to prevent train and engine crews from being on duty over sixteen hours without great hardship to them and also the traveling public."
>
> (Vol. 41, p. 827.)

On January 10, 1907, immediately preceding the passage of the bill, Senator La Follette, in referring to the criticism which had been urged by Senator Patterson, said:

> "I think the criticism of the senator from Colo-

rado is a just one. Provision should be made to meet that criticism. It seems to me that this can be done easily, and if no one offers such an amendment I shall offer one which I believe will meet that objection."

(Vol. 41, p. 876.)

Which he thereupon did by offering by way of amendment a substitute bill containing a proviso reading as follows:

"except when on account of an emergency, which, by reasonable care on the part of such carriers, its officers or agents, could not have been avoided, he is prevented from reaching his terminal. * * *"

(Vol. 41, p. 891.)

House Amendments.

The substitute bill offered by Senator La Follette, which passed the Senate January 10, was sent to the House and was referred to the House Committee on Interstate and Foreign Commerce. (Vol. 41, p. 954.)

Congressman Esch had theretofore introduced in the House H. R. 18671, which contained a proviso reading as follows:

"Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occurring after such employee has left a terminal, he is prevented from reaching his terminal within the time specified in section one of this act."

(Vol. 40, p. 5938.)

In reporting back H. R. 18671 on May 31, 1906, the committee recommended the proviso be changed to read:

"Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he left a terminal, he is prevented from reaching his terminal within the time specified in section one of this act."

(Vol. 40, p. 7680.)

On May 4, 1906, Mr. Esch introduced in the House another bill—H. R. 18961—of a similar nature, which made it unlawful to permit employees "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip he is prevented from reaching his terminal." (Vol. 40, p. 6406.)

On February 20, 1907, Mr. Bede introduced House Resolution 25757, which made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching his terminal." (Vol. 41, p. 3503.)

On February 16, 1907, Senate Bill 5133 was reported back to the House by its Committee on Interstate and Foreign Commerce (See House Report 7641) and placed on the House calendar, with the proviso reading as follows:

> "Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen with the exercise of ordinary prudence."
>
> (Vol. 41, pp. 3155, 3235.)

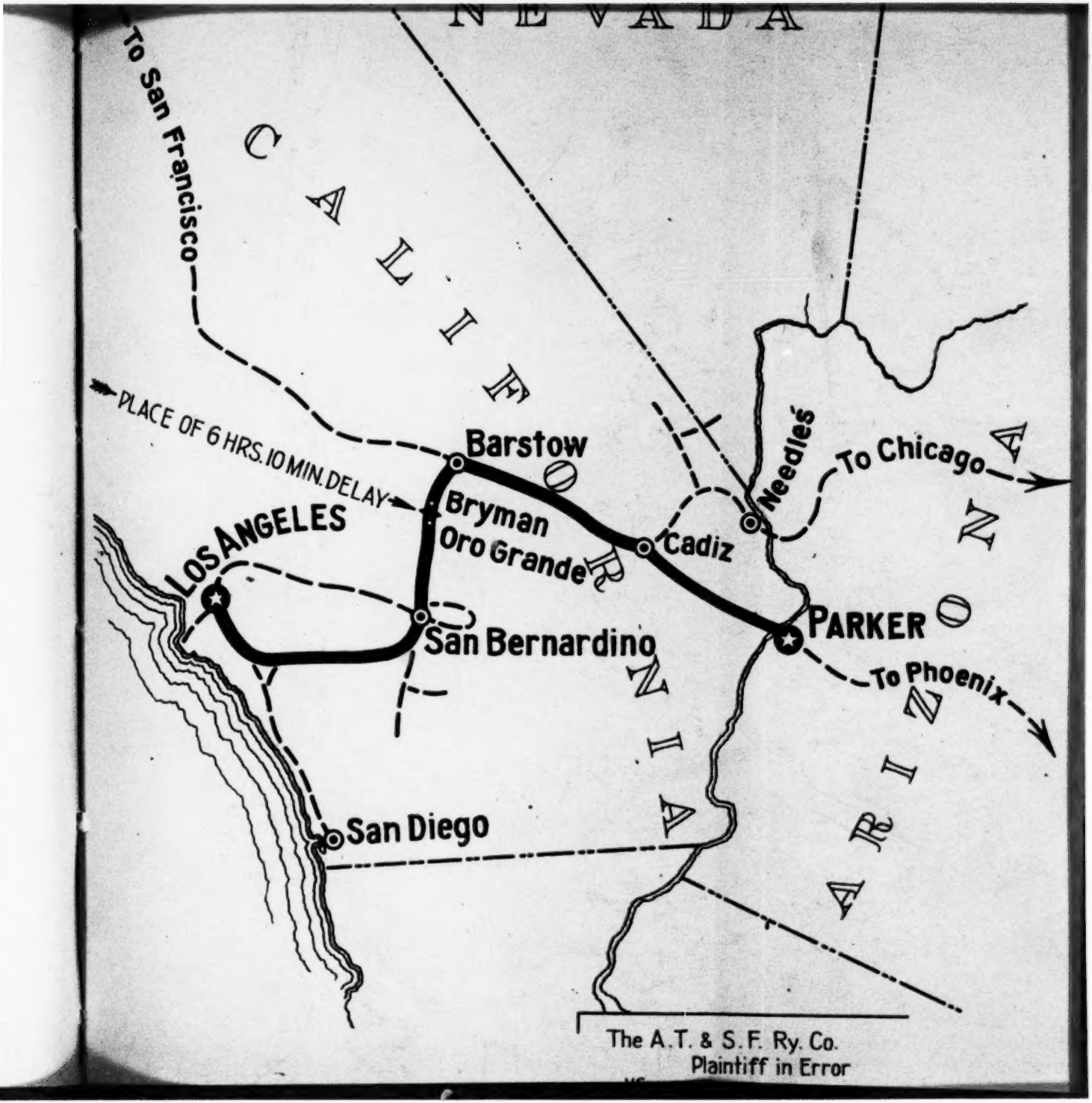
The Senate disagreed to the amendments made by the House and requested a conference. (Vol. 41, p. 3235.)

On March 1, there was reported to the Senate by the Conference Committee the bill containing the proviso as finally enacted. (Vol. 41, p. 4348.)

During the discussion of the bill in the House Congressman Stephens, on February 18, 1907, compared the House substitute with the Senate bill, and specifically

stated that the provisions authorizing the extension of sixteen hours of duty in exceptional cases are (1) that the provisions of this act shall not apply in any case of casualty, unavoidable accident or the act of God; and (2) nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left a terminal which could not have been foreseen with the exercise of ordinary prudence; and further said:

> "The provisions of exceptions allowing the railroad companies to work their men more than sixteen consecutive hours are defined clearly and closely and narrowly in the House bill. The carriers are confined within the narrow and closely defined limits admitted by all to be fair and reasonable."
>
> (Vol. 41, p. 3250.)


NEVADA
CALIFORNIA
ARIZONA
To San Francisco
PLACE OF 6 HRS. 10 MIN. DELAY
Barstow
Bryman
Oro Grande
Cadiz
Needles
To Chicago
LOS ANGELES
San Bernardino
PARKER
To Phoenix
San Diego
The A.T. & S.F. Ry. Co.
Plaintiff in Error

INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE ATCHISON, TOPEKA & SANTA FE Railway Company, Petitioner, v. THE UNITED STATES. } No. 267.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This is a civil proceeding by the United States to recover $1,500 from the Atchison, Topeka & Santa Fe Railway Company for three alleged violations of the Hours of Service Act of March 4, 1907 (c. 2939, 34 Stat. 1415, 1416), the pertinent provisions of which are as follows:

> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of

such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: * * *.

SEC. 3. * * * *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. * * *

The case was submitted to the District Court for the Southern District of California on an agreed statement of facts (R., 17–34). The trial court entered judgment in favor of the plaintiff for $100 on each of three causes of action (R., 14), and upon appeal to the Circuit Court of Appeals for the Ninth Circuit the judgment was affirmed. (R., 61; 220 Fed. 748.)

The declaration contained three causes of action, each alleging a violation of the Hours of Service Act, and the facts, as agreed upon by the parties, were briefly as follows:

A passenger train, operated between Parker, Ariz., and Los Angeles, Cal., usually made the trip in 11 hours and 5 minutes. On account of two una-

voidable accidents, one due to a washout and the other to the breaking of an axle, both unknown and unforeseen at the beginning of the trip, it required, on October 2 and 3, 1912, 21 hours and 45 minutes to make the run. The first accident was responsible for a delay of 2 hours and 30 minutes, and the second, which occurred just before the train reached San Bernardino, a divisional terminal, where it was possible and the company had ample opportunity to secure new train crews, caused a delay of 6 hours and 10 minutes. Nevertheless, the train crew was not relieved at San Bernardino, but allowed to proceed to Los Angeles.

QUESTION INVOLVED.

The question presented is: Does section 3, above quoted, in case of unavoidable and unforeseen accidents, operate to permit employees to continue the operation of a train to the end of its customary run, regardless of the time required, or only to "a terminal" where a new crew may be obtained?

ARGUMENT.

I.

CONSTRUCTION OF THE ACT.

The Act is remedial. It was passed to protect the public and employees of carriers, and should be so construed as to accomplish its purpose.

> To protect the lives of employees and of the traveling public against accidents due to loss of efficiency from overwork was the purpose of

> limiting the hours of continuous service. Actions for violations are civil; and the statute, in view of its purpose, should be liberally construed to accomplish the intended cure. If affirmative defenses are pleaded, the proof should bring the case clearly within the letter as well as within the spirit of the proviso. *U. S.* v. *Ill. Centr. Rld.* (D. C.), 180 Fed. 630; *U. S.* v. *Kansas City So. Rld.* (D. C.), 189 Fed. 471; *U. S.* v. *Denver & Rio G. Rld.*, 197 Fed. 629; *U. S.* v. *Kansas City So. Rld.*, 202 Fed. 828, 121 C. C. A. 136; *U. S.* v. *Great Northern Rld.* (D. C.), 206 Fed. 838; *U. S.* v. *Mo. Pac. Rld.* (D. C.), 206 Fed. 847; *Great Northern Rld.* v. *U. S.*, 211 Fed. 309, 127 C. C. A., 595; *U. S.* v. *Atchison, Topeka & S. F. Rld.* (D. C.), 212 Fed. 1000. (*United States* v. *Great Northern Ry. Co.* (C. C. A., 7th Circuit), 220 Fed. 630, 633.)

To the same effect are the cases of *San Pedro, Los Angeles & Salt Lake Railroad Co.* v. *United States* (C. C. A., 8th Circuit), 213 Fed. 326; and *United States* v. *Atlantic Coast Line* (C. C. A., 4th Circuit), 211 Fed. 897.

The Act forbids all excess service except in particular instances specified in the provisos. Being strictly construed, provisos will not be extended to cover exceptions not clearly within their terms.

This court, speaking through Mr. Justice Story, in *United States* v. *Dickson*, 15 Pet. 141, 165, said:

> * * * we are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the inter-

> pretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof.

See also *Spokane & Inland Empire R. R. Co.* v. *United States*, 241 U. S. 344, 350.

The facts do not bring this case within the proviso of section 3.

The first part of the section provides "that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God." This provision can not be interpreted literally, because it is evident that Congress intended there should be at least some casual relation between the accident and noncompliance with the provisions of the Act. (*Gleeson* v. *Virginia Midland R. R. Co.*, 140 U. S., 435, 444; *New Orleans*, etc., *R. R. Co.* v. *National Rice Milling Co.*, 234 U. S. 80.) The purpose of Congress, gathered from a consideration of the whole Act and its legislative history, was to relieve the carrier from the operation of the Act only in instances where such accident was the proximate cause of the inability to comply with the statute.

In the case of *Newport News, etc., Co.* v. *United States*, 61 Fed. 488, 490, the Circuit Court of Appeals for the Sixth Circuit (Taft, Lurton and Key), in construing the Twenty-Eight Hour Law, through Judge Lurton, said:

> This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show, not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law.

In a case similar to the one at bar, the Circuit Court of Appeals for the Ninth Circuit said:

> * * * Manifestly the whole act must be taken together, and be so construed as to give effect to its humane purpose, and at the same

> time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent. There can be no doubt that the paramount purpose of the act was to prevent the overworking of the employees, to the end that their efficiency be not impaired, and that the obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse, secured to them by the provisos and exceptions contained in the act, * * *.
>
> It would seem to follow necessarily that in order for the carrier to justify the excess of service beyond the fixed period prescribed by the act, it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that was the result of a cause not known to the carrier or its officer or agent in charge of such employee, at the time the latter left a terminal, and which could not have been foreseen. (*San Pedro, Los Angeles & Salt Lake R. R. Co.* v. *United States*, 220 Fed. 737, 742.)

Since, therefore, Congress must be presumed to have intended to relieve the carrier from the operation of the Act only in cases where the casualty was the proximate cause, by like reasoning we must deduce an intention on its part to so relieve the carrier only during the continuance of the necessity arising out of such accident. Though a casualty may have

occurred, nevertheless, if subsequently it became possible for the carrier, by the exercise of proper diligence, to avoid the consequences thereof, then the negligence of the carrier was the proximate, and the casualty only the remote, cause of the violation of the Act.

To apply this principle to the concrete case, the Government submits that, because of the failure of the carrier to relieve the crew at San Bernardino where other crews were available, the Act, if ever inapplicable, reapplied and the subsequent requiring of excess service of its employees was a violation of the Act, because such failure and not the accident was the proximate cause of the excess service.

Neither does the case fall within the latter part of section 3, which provides: "Nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

To give this proviso the construction contended for by petitioner, it would be necessary to construe the words "at the time said employee left *a* terminal" to mean at the time said employee left "*the* terminal from which the train started on the trip." These words of the proviso are not ambiguous, and therefore their plain meaning should not be changed by reading into the section words which Congress did not use. (*Leavenworth, etc., Co.* v. *United States*, 92 U. S. 733, 751; *United States* v. *Temple*, 105 U. S. 97, 99;

Thornley v. *United States*, 113 U. S. 310, 315; *Newhall* v. *Sanger*, 92 U. S. 761, 765.) To do so would not only give an unjustifiable construction to the letter of the Act, but would also be contrary to its spirit.

In construing this statute, this court said:

> * * * that as towards the public every overworked man presents a distinct danger, and as towards the employees each case of course is distinct. (*Missouri, K. & T. Ry. Co. of Texas* v. *United States*, 231 U. S. 112, 119.)

The whole purpose of the Act was to remove this danger. The construction sought by petitioner would render the Act inoperative where the delay arose from accidents happening any time after the train started upon its run. Such construction, it is submitted, violates both the letter and the spirit of the words in question, and, without good reason, submits employees and the public to the dangers sought to be avoided by the Act.

The following decisions support the Government's contention: *San Pedro, Los Angeles & Salt Lake R. R. Co.*, v. *United States* (C. C. A., 9th Circuit), 220 Fed. 737; *United States* v. *Southern Pacific Co.* (C. C. A., 9th Circuit), id. 745; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States* (C. C. A., 9th Circuit), id. 748; *United States* v. *Atchison T. & S. F. Ry. Co.*, 236 Fed. 154; *United States* v. *Baltimore & Ohio R. R. Co.*, decided December 2, 1915. In the

case last cited, Judge (now Mr. Justice) Clarke charged the jury as follows:

> My construction of the law is, and I charge you that it is the law of this case, that it was the duty of the defendant to exercise a very high degree of effort and diligence, having regard to the means of conveyance employed and to the circumstances surrounding the transportation of the train on the night in question to have its cars in good order before train No. 97 started on its journey; and also, if, in the course of its journey, *through casualty or unavoidable accident, or the act of God*, or as the result of a cause not known to the company, or any of its agents in charge of the crew of the train, any delay occurred, that then the company *could not lawfully simply add this delay to the 16 hours* which it might keep its crew on duty, but that when such a delay from such a cause arose *it became the duty* of the defendant railroad company *to exert itself in a highly energetic and diligent manner* to either get its train through to its intended terminal within the 16 hours allowed by law or *to make arrangements to have the men of the crew relieved at the expiration of that time*. (Italics ours.)

In the following unreported cases, also, the trial judges have adopted the construction of the proviso contended for by the Government:

> *United States* v. *Southern Railway Co.*, Western District of North Carolina, decided October 30, 1913, District Judge Smith.

United States v. *Baltimore & Ohio Railroad Co.* (No. 1710), Southern District of Ohio, decided December 17, 1913, District Judge Sater.

United States v. *Oregon-Washington R. & N. Co.* (No. 5943), District of Oregon, decided June 4, 1914, District Judge Bean.

Such construction is not in conflict with the ruling of the Circuit Court of Appeals for the Ninth Circuit in the case of *United States* v. *Northern Pacific Railway Co.*, 215 Fed. 64. (*San Pedro, Los Angeles & Salt Lake R. R. Co.* v. *United States*, 220 Fed. 737, 743; *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 236 Fed. 154, 157.)

II.

RULE OF CONTEMPORANEOUS CONSTRUCTION BY ADMINISTRATIVE BODY INAPPLICABLE IN THIS CASE.

Plaintiff in error relies largely upon an order of the Interstate Commerce Commission as a contemporaneous construction of the Act by the body who is charged with its administration. This order was made May 25, 1908 (R. 30), and is, in part, as follows:

> (*b*) Section 3 of the law provides that: "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."
>
> Any employee so delayed may therefore continue on duty to the terminal or end of that

> run. The proviso quoted removes the application of the law to that trip. (See Rule 287.)

Prior to this, however, the Commission on March 16, 1908, 12 days after the Act became effective, made a ruling as follows:

> The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (R. 29.)

Apparently these two orders are conflicting, and it is so charged in the brief for plaintiff in error (B., p. 42). In view of this conflict in the rulings of the Commission, the ruling relied upon by plaintiff in error is not entitled to great weight as a contemporaneous construction of the Act.

But even were it otherwise, the ruling of the Commission could not modify or vary the unambiguous provisions of the act.

> In arriving at this conclusion we are not unmindful of the fact that the defendants in error made their protest in accordance with the regulations of the Treasury Department in force at that time. A regulation of a department, however, can not repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has

been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and pursuasive reasons. (*Merritt* v. *Cameron*, 137 U. S. 542, 551–552.)

* * * Contemporaneous construction is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute. (*Houghton* v. *Payne*, 194 U. S. 88, 99–100.)

See, also, *United States* v. *George*, 228 U. S. 14; *Morrill* v. *Jones*, 106 U. S. 466; *Payne* v. *National Railway Publishing Co.*, 20 App. D. C., 581; *United States* v. *Healey*, 160 U. S. 136, 145.

Plaintiff in error argues that by the reenactment (May 4, 1916; c. 109, 39 Stat. 61) of this proviso in the precise language in which it was first enacted Congress adopted the construction placed upon it in the Commission's order of May 25, 1908. In other words, that Congress in reenacting the proviso adopted one of two conflicting constructions placed upon it by the Commission, rather than the construction given it by the Circuit Court of Appeals for the Ninth Circuit and every other court but one which had passed upon the question. We submit that the more reasonable assumption is that Congress adopted the construction placed upon it by the courts.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully,

E. MARVIN UNDERWOOD,
Assistant Attorney General.

ALEX KOPLIN, *Attorney,*
April, 1917.

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